No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 20, 1996 Decided August 27, 1996

No. 94-7203

LEONARD ROLLON CRAWFORD-EL,
APPELLANT

v.

PATRICIA BRITTON AND THE DISTRICT OF COLUMBIA,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 89cv03076)

Daniel M. Schember argued the cause and filed the briefs for appellant.

Charles L. Reischel, Deputy Corporation Counsel, argued the cause for appellees. With him on the brief were *Charles F. Ruff*, Corporation Counsel, and *Edward E. Schwab*, Assistant Corporation Counsel. *Garland Pinkston, Jr.*, Principal Deputy Corporation Counsel and *Erias A. Hyman*, Counsel, entered appearances.

Stephen W. Preston, Deputy Assistant Attorney General, United States Department of Justice, argued the cause for *amicus curiae* the United States. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, *Barbara L. Herwig*, Assistant Director, *Robert M. Loeb*, Attorney and *Eric H. Holder, Jr.*, United States Attorney.

Michael L. Martinez and *William J. Dempster* were on the brief for *amici curiae* J. Michael Quinlan and Loye W. Miller, Jr.

Arthur B. Spitzer was on the brief for *amicus curiae* American Civil Liberties Union of the National Capital Area.

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS and TATEL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WILLIAMS.

Concurring opinion filed by *Circuit Judge* SILBERMAN.

Concurring opinion filed by *Circuit Judge* GINSBURG.

Concurring opinion filed by *Circuit Judge* HENDERSON.

Opinion filed by *Chief Judge* EDWARDS, concurring in the judgment to remand.

WILLIAMS, *Circuit Judge*: We decided to hear this case en banc on our own initiative in order to resolve continuing disputes as to how a government official's assertion of qualified immunity, as a defense to a damage action for a constitutional tort, may affect pleading and summary judgment standards where the unconstitutionality of the official's act turns on his motive. Our inquiry is framed by the

competing goals described by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982)—vindicating constitutional rights but at the same time protecting officials from exposure to discovery and trial that would unduly chill their readiness to exercise discretion in the public interest. We here discard our former solution—a requirement that the plaintiff allege "direct" evidence of unconstitutional motive. See, e.g., *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), aff'd on other grounds, 500 U.S. 226 (1991). But we read *Harlow* as calling for alternative rules to protect officials. First, we think *Harlow* allows an official to get summary judgment resolution of the qualified immunity issue, including the question of the official's state of mind, *before* the plaintiff has engaged in discovery on that issue. Second, we believe that unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant.

* * *

Crawford-El is a prisoner in the District of Columbia's correctional system serving a life sentence for murder. He filed the present lawsuit in 1989, claiming that the individual defendant, Patricia Britton, a D.C. correctional official, and the District of Columbia had misdelivered boxes belonging to him containing legal papers, clothes and other personal items, thereby violating his constitutional right of access to the courts. When Britton moved for dismissal and for summary judgment on grounds of qualified immunity, the district court denied the motion and Britton appealed. We reviewed Crawford-El's allegations under a "heightened pleading" requirement, insisting that the plaintiff in such a case advance "nonconclusory allegations that are sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds."

Crawford-El v. Britton, 951 F.2d 1314, 1317 (D.C. Cir. 1991) (quotations omitted). By this standard we found his claims wanting. Because we thought that our heightened pleading doctrine had become clearer in ways adverse to plaintiff since his pleading, however, we remanded the case to the district court in case that court, in its discretion, should decide to permit repleading. *Id.* at 1322.

On remand the district court indeed granted permission, and Crawford-El filed his Fourth Amended Complaint. There he repleaded the access-to-courts claim, but without adding material to fill the gap identified in our first opinion. He also pleaded a due process claim. The district court dismissed both claims, and a panel of this court affirmed. *Crawford-El v. Britton*, No. 94-7203, mem. op. at 1-2 (D.C. Cir. Nov. 28, 1995). In addition, Crawford-El charged that the defendants' alleged misdelivery of his belongings was in retaliation for various feisty communications with the press and thus in violation of the First Amendment. (This claim had initially appeared in his briefing on the first round in this court. See *Crawford-El*, 951 F.2d at 1316.) The district court granted the defendants' motion to dismiss the First Amendment claim as well, saying that the complaint did not allege "direct" evidence of unconstitutional motivation and citing *Siegert v. Gilley*, 895 F.2d 797, 800-802 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226, 231 (1991), our court's most emphatic statement of the "direct" evidence requirement. *Crawford-El v. Britton*, No. 89-3076, mem. op. at 14-15 (D.D.C. Feb. 15, 1994). After affirming dismissal of the first two claims, the panel suggested, and the court *en banc* agreed, that the dismissal of the First Amendment retaliation claim should be heard by the court *en banc*.[1]

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[1] Our order for rehearing *en banc* relates only to the qualified immunity raised by plaintiff's action against Britton. But the District of Columbia is, as noted in the text, still in the case.

The background law on subjective motivation and qualified immunity.

In *Harlow v. Fitzgerald* the Court reformulated its test for officials' qualified immunity in constitutional tort actions. For acts to which qualified immunity may apply,[2] it held that the plaintiff can prevail only by showing not just that there was a violation, but that defendant's acts violated "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. It thus *excluded* liability where there was a violation (but not of a right so clearly established that a reasonable person would

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The district court had dismissed it as a defendant, but since in his successive amended complaints Crawford-El repeatedly named the District as a defendant and the District did not object, the district court held that the District had waived a law-of-the-case argument and therefore reinstated it as defendant. *Crawford-El v. Britton*, No. 89-3076, mem. op. at 1 n.1 (D.D.C. Feb. 15, 1994). Because Crawford-El's claims against the District do not concern the questions for which we granted rehearing en banc, they are to be resolved by the panel.

Another extant part of the complaint is a pendant District law claim for conversion of Crawford-El's property. The survival of this claim (in the federal courts) turns on whether, after the remand ordered here, there is any federal claim to which it may be appended.

[2] The qualified immunity defense is unavailable for ministerial acts, see *Harlow*, 457 U.S. at 816; see also *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984), and unnecessary for acts for which the officer enjoys absolute immunity, see *Harlow*, 457 U.S. at 807.

have known of it) even when the official acted "with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

The Court was quite explicit as to the purpose of its change. It noted that claims against officers necessarily included ones "against the innocent as well as the guilty," and that among the "social costs" of such suits were "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. Last but not least, it invoked Judge Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), which had argued that the fear of being sued would "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." 177 F.2d at 581 (quoted in *Harlow*, 457 U.S. at 814). It saw the inclusion of liability based on subjective malice as greatly increasing all these costs. Because such liability opened up a wide field of inquiry, often with "no clear end to the relevant evidence" bearing on the official's "experiences, values, and emotions," and typically not susceptible of disposition by summary judgment, its resolution was "peculiarly disruptive of effective government." *Id.* at 816-17. Most notably for our purposes, the Court underscored the burdensome character of *discovery* flowing from such liability. See *id.* at 817 (speaking of the "broad-ranging discovery" that would result from allowing such claims); *id.* at 818 (speaking of the resulting "broad-reaching discovery"). Moreover, the Court said, such liability would thwart what had been its assumption in its earlier definition of qualified immunity—that "[i]nsubstantial lawsuits" would be quickly terminated." *Id.* at 814 (quoting *Butz v. Economou*, 438 U.S. 478, 507-508 (1978)). Accordingly the Court held that qualified immunity could be penetrated only on a showing of *objective*

unreasonableness—the now familiar requirement of "clearly established" rights. *Id.* at 818. Henceforth, "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18. The Court later described *Harlow* as having "purged qualified immunity doctrine of its subjective components." *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985); see also *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

In fact, under the decisions of every circuit court addressing the matter, *Harlow* has not accomplished the stated purpose. This circuit and others have understood *Harlow* to allow inquiry into subjective motivation where an otherwise constitutional act becomes unconstitutional only when performed with some sort of forbidden motive (such as, here, the claim that Britton's decisions routing Crawford-El's parcels were driven by a desire to penalize his exercise of free speech rights). See, e.g., *Siegert v. Gilley*, 895 F.2d at 800-801; *Whitacre v. Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989); *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1431 (D.C. Cir. 1987); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991); *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir. 1994); cf. *Halperin v. Kissinger*, 807 F.2d 180, 186-87 (D.C. Cir. 1986) (noting this court's and others' decisions to allow unconstitutional motive claims in areas other than national security). Even though it has entailed many of the "social costs" of inquiry into subjective motivation stated in *Harlow*, courts have concluded that the vindication of constitutional rights calls for damages liability—often the only device available for such vindication. *Halperin*, 807 F.2d at 186.

In *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), we recognized the problem, noting that a plaintiff's claim of unconstitutional motive could easily lead to discovery and trial, with no hope of success, and the "result would be precisely the burden *Harlow* sought to prevent." *Id.* at 29. We decided that for claims of which unconstitutional intent was an essential part, "nonconclusory allegations of evidence of such intent must be present in a complaint for litigants to proceed to discovery on the claim. The allegations on this issue need not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Id.* This did not speak explicitly to the issue of whether a plaintiff must surmount any particular burden in order to secure discovery. But in *Martin v. D.C. Metropolitan Police* we specifically took the view that the *substantive* characteristics of cases involving qualified immunity and unconstitutional motive required deviation from garden-variety application of the Federal Rules of Civil Procedure's liberal pleading and discovery rules. We quoted at length and with evident approbation from a Fifth Circuit decision:

> What is a federal trial judge to do? One thing he may not do: face it as just another lawsuit in which the notice pleading's liberal policy of F.R. Civ. P. 8 counts on pre-trial discovery to ascertain the factual basis for the claim[.] ... Allowing pretrial depositions, especially those taken adversely of the government official to ferret all of his actions and the reasons therefor ... would defeat and frustrate the function and purpose of the ... immunity[.] ... [U]se of liberal discovery to establish the basis of a claim is directly at odds with the Court's direction in *Harlow* that government officials entitled to immunity [are to] be freed

> from the burdens, the stress, the anxieties and the diversions of pretrial preparations.

Martin, 812 F.2d at 1437 (R.B. Ginsburg, J.) (quoting *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985)) (footnotes omitted).

Our holding in *Martin* both imposed a "direct evidence" requirement and related it to the problem of discovery. To get to trial, we said, a plaintiff must produce "*something more than inferential or circumstantial* support for his allegation of unconstitutional motive. That is, some *direct* evidence [of improper motivation] must be produced...." 812 F.2d at 1435 (emphasis added). But we formulated no explicit rule on discovery. While we quoted *Elliott*'s exhortation about protecting officials from "the burdens, the stress, the anxieties and the diversions of pretrial preparations," we also said that a complete ban on plaintiff's discovery of defendant before resolution of qualified immunity issues on summary judgment might turn the prior decisions allowing plaintiffs to raise claims of unconstitutional motive into an "empty gesture," *id.* at 1437, and that we were "leaving some space for discovery," *id.* We told district courts to employ "with particular care and sensibility their large authority to exercise control over discovery" in order to balance all the concerns properly. *Id.* at 1436-37.[3]

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[3] Then-Judge Ginsburg later observed that in *Martin* the court had "cut back allowable discovery severely, permitting only a sharply limited, precisely defined line of inquiry, and even then, only because of special exigencies in the particular case." *Bartlett v. Bowen*, 824 F.2d 1240, 1245 (D.C. Cir. 1987) (R.B. Ginsburg, J., concurring in denial of rehearing *en banc* in *Martin* and several other cases).

In *Whitacre v. Davey* we read *Martin* to require allegations of direct evidence of unconstitutional motive to survive a motion to dismiss and get discovery, 890 F.2d at 1171 & n.4, but the point was not necessary to the case because the allegations of circumstantial evidence were inadequate even under the less demanding standard of Title VII, see *id.* at 1172. Finally, in *Siegert v. Gilley*, 895 F.2d at 802, we specifically held that "in order to obtain even limited discovery, such [unconstitutional] intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent." The pleading requirement entailed the discovery consequence: if defendant was entitled to dismissal of the case in the absence of specific assertions of direct evidence, there would be no occasion for discovery. Although the Supreme Court granted certiorari on the question whether "a "heightened pleading' standard which precludes limited discovery prior to disposition on a summary judgment motion violates applicable law," Pet. for Cert. i, quoted in *Siegert v. Gilley*, 500 U.S. 226, 237 (1991) (Marshall, J., dissenting), the Court in fact affirmed on a different, "preliminary" issue, namely its conclusion that plaintiff had failed to allege a constitutional violation at all. *Id.* at 232-35. In *Kimberlin v. Quinlan*, 6 F.3d 789, 793-94 (D.C. Cir. 1993), we applied our "direct evidence" requirement, and denied rehearing *en banc* with a flurry of concurring and dissenting opinions, 17 F.3d 1525 (D.C. Cir. 1994). The Supreme Court granted certiorari, 115 S. Ct. 929 (1995), but then vacated and remanded, 115 S. Ct. 2552 (1995), for consideration in the light of *Johnson v. Jones*, 115 S. Ct. 2151 (1995), which clarified the circumstances permitting an interlocutory appeal from denial of a summary judgment motion by a defendant invoking qualified immunity; we then dismissed the *Kimberlin* appeal. No. 91-5315, 1995 WL 759464 (D.C. Cir. Nov. 8, 1995) (order remanding case to district court).

Because the district court here applied the "direct evidence" rule, mem. op. at 5 n.4, and found Crawford-El's complaint wanting, *id.* at 15-17, the present case calls on us to decide whether the circuit should continue to apply that rule, foreclosing discovery unless the pleadings assert "direct evidence" of illicit motive. We find that question easy, at least if, as we believe, there are adequate alternative means of reconciling *Harlow*'s twin purposes in the context of constitutional torts dependent on the official's having an improper motive. We first address the drawbacks of the "direct evidence" rule, and then consider alternative extrapolations from the logic of *Harlow*.

Deficiencies of the "direct evidence" requirement.

First, the distinction between direct and circumstantial evidence has no direct correlation with the strength of the plaintiff's case. While a perjured claim of having heard a confession of unconstitutional motive would meet the test, a massive circumstantial case would not. See *Siegert v. Gilley*, 500 U.S. at 236 (Kennedy, J., concurring) (rejecting D.C. Circuit's direct/circumstantial test on this ground); *Elliott v. Thomas*, 937 F.2d at 345 (same). Second, the distinction does not appear calibrated in any other way to the trade-offs found determinative by the Court in *Harlow* and qualified immunity doctrine generally. Although the rule presumably did reduce the incidence of motive-related damage suits against officers, we have no reason to think that it did any better as a screen than, say, a random rejection of nine out of every ten claims. The abandonment of circuit precedent *en banc* is of course not to be lightly undertaken. *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 875 (D.C. Cir. 1992) (en banc) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). We have noted in contemplating such overrulings that treatment of the issue in other circuits is a factor to be considered. *Id.* at 876. Here, the only courts to consider our

direct evidence rule have rejected it emphatically, see *Elliott v. Thomas*; *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991), as have the four Supreme Court justices who have chosen to speak on the matter. *Siegert v. Gilley*, 500 U.S. at 235-36 (Kennedy, J., concurring); *id.* at 245-46 (Marshall, J., with whom Blackmun & Stevens, JJ., concurred, dissenting). Under the circumstances, we think it readily justifiable to overrule our precedents establishing the direct/circumstantial distinction, without even addressing the question whether formulation of the rule as a *pleading* requirement violates the liberal pleading concepts established by the Federal Rules of Civil Procedure. See *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (invalidating heightened pleading requirement invoked by municipal government unit as defense to constitutional tort, as violation of Rules 8 and 9(b), but reserving issue of holding's application to claims against individual government officials).

Alternative protections inferred from Harlow.

In *Harlow* the Supreme Court assumed that it had established principles of officer liability that eliminated the litigation burdens associated with an official's state of mind, or, as it put the point in *Mitchell v. Forsyth*, that it had "purged qualified immunity doctrine of its subjective components." 472 U.S. at 517. For that proposition to be literally true, it would be necessary to reject *any* officer liability for constitutional torts in which the officer's intent is an essential element in rendering the conduct unconstitutional. See *Elliott v. Thomas*, 937 F.2d at 344 (carrying out "the program of *Harlow*" would require imputing to defendants the best intent they could possibly have); see also Silberman Op., *post* (reading *Harlow* to extinguish liability for such torts). As *Elliott* noted, however, that would eliminate any damage remedy even for "egregious wrongdoing." 937 F.2d at 344; see also *Halperin*, 807 F.2d at 186. What, then, does

Harlow suggest are appropriate devices to balance the interest in providing remedies against the interest in protecting officials from the undue litigation burdens, including, as *Harlow* emphasized, discovery itself?

We think the crux of the answer lies at the summary judgment phase of litigation. It divides into two questions: First, what *methods* may plaintiff use to secure evidence to resist the defendant's motion for summary judgment? Second, must plaintiff's evidence substantively meet some *higher standard* than the conventional preponderance test?

1. *Methods available to plaintiff for securing evidence for purposes of summary judgment resolution of qualified immunity.* The primary burdens of litigation occur in discovery and trial. If the plaintiff can defer summary judgment while he uses discovery to extract evidence as to defendant's state of mind, *Harlow*'s concern about exposing officials to debilitating discovery will generally be defeated in constitutional tort cases dependent on improper motive. After describing its objective test, the Court said, "Until this threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. We can protect the sequence apparently insisted upon by *Harlow*—no discovery until there has been at least one cut at the qualified immunity issue—by the straightforward rule that plaintiff cannot defeat a summary judgment motion unless, prior to discovery, he offers specific, non-conclusory assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact finder could infer the forbidden motive. In his concurring opinion in *Siegert*, Justice Kennedy adumbrated this approach. Observing that "heightened pleading" was inconsistent with Federal Rules of Civil Procedure 8 and 9(b), he said:

> But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. *The substantive defense of immunity controls.*
>
> Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal.

500 U.S. at 236 (emphasis added).

In *Elliott v. Thomas*, 937 F.2d at 344-46, Judge Easterbrook spelled out the point in more detail. "Unless the plaintiff has the kernel of a case in hand [specific, nonconclusory allegations which establish the necessary mental state], the defendant wins on immunity grounds in advance of discovery." *Id.* at 344-45. Because the substantive law—the law of qualified immunity per *Harlow*—tells the court what is needed for summary judgment, there is no conflict with Rule 56's provision for summary judgment:

> If a rule of law crafted to carry out the promise of *Harlow* *requires the plaintiff to produce* some evidence, and the plaintiff fails to do so, then Rule 56(c) allows the court to grant the motion for summary judgment without ado.

937 F.2d at 345 (emphasis added). This is, of course, substantially similar in result to the imposition of a "heightened pleading" standard, in that both prevent serious invasion of the defendant's time unless the plaintiff can, without discovery, offer specifics of his case as to defendant's motivation. See, e.g., *Elliott v. Perez*; *Sawyer v. County of Creek*, 908 F.2d 663, 665, 668 (10th Cir. 1990) (noting that

because plaintiff conceded inability to amend complaint without discovery, dismissal would be with prejudice).

Although neither *Elliott* nor Justice Kennedy's concurrence in *Siegert* expressly addressed Rule 56(f), which authorizes the district judge to defer ruling on summary judgment and to provide for depositions and other discovery, the solution flows from their analysis of *Harlow*—its articulation of the *substantive* right of qualified immunity. To allow the plaintiff to engage in discovery, in order to carry his burden of establishing a basis for inferring improper motive, would violate *Harlow*'s determination to protect the official from discovery until the qualified immunity issue has been resolved. Under the Rules Enabling Act, the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), so that any reading of the Rules to trump officials' substantive entitlements is impermissible.

We note that the rule preventing discovery concerning illicit *motivation* does not bar discovery concerning a defendant official's state of mind for other purposes. A claim for damages for an allegedly unreasonable search or seizure will often turn on whether the defendant was in possession of facts that would have led a reasonable officer to suppose he had probable cause or exigent circumstances. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987) (relevant question in that case was "the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and *the information the searching officers possessed*") (emphasis added). Although the *Anderson* Court appeared to discourage discovery even in that context, see *id.* at 646-47 n.6, we do not understand its message as remotely approaching an absolute bar. Similarly, in *Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 788-

89 (7th Cir. 1995), the Seventh Circuit said it would permit discovery to allow a prisoner to identify the proper defendants in an Eighth Amendment case where a defendant would be liable if it were shown that he *knew* plaintiff's cellmate was HIV-positive and had a tendency to rape cellmates, and was responsible for the assignment. The state-of-mind showings the plaintiffs had to make in *Anderson* and *Billman* thus went simply to the defendants' acquisition of particular facts, not the broader inquiry into motivation at stake here.[4] Our case would be equivalent if Crawford-El had simply to show that Britton knew the boxes contained legal papers (or something else of value to plaintiff) and was responsible for their transfer.

2. *Requirement of clear and convincing evidence*. There still remains the question whether the defendant's entitlement to summary judgment on qualified immunity before plaintiff's discovery achieves an adequate balance in light of *Harlow*'s purposes. Conventional summary judgment principles supply some protection to defendants. Plaintiff must do better than "show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to block summary judgment for defendant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

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[4] Thus, unlike Judge Edwards, see Edwards at 7-8, we do not see any schism in the Seventh Circuit, between *Elliott*'s requirement that plaintiff himself supply evidence of defendant's illicit motivation in order to withstand defendant's summary judgment motion, 937 F.2d at 345, and *Billman*'s allowing plaintiff discovery to develop evidence that defendant was aware of facts that would, if known to defendant, render his conduct violative of the 8th Amendment.

Here defendants argue that that is not enough. They propose a special standard, which they frame as a requirement of "strong evidence." The United States as amicus proposes a similar heightened standard; framing the proposal in terms of pleading, it suggests that plaintiff be required to "plead specific facts giving rise to a strong inference of the alleged improper motive before any discovery will be permitted."[5]

Two factors make us believe that the standard protection of summary judgment (coupled with the limit on discovery stated above) leave an exposure to both liability and litigation that is impossible to square with *Harlow*. First, unconstitutional motivation is, as is often said of civil fraud, easy to allege and hard to disprove. *Bower v. Jones*, 978 F.2d 1004, 1012 (7th Cir. 1992) (citing *Hollymatic Corp. v. Holly Systems, Inc.*, 620 F. Supp. 1366, 1369 (N.D. Ill. 1985) ("[F]raud, focusing as it does on a subjective state of mind, can be very easy to allege and very difficult to prove or disprove.")); see also *Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990) (rationale behind heightened pleading requirement for fraud in Rule 9(b) is preventing improvident charges of wrongdoing and strike suits); Charles A. Wright & Arthur R. Miller, 5 *Federal Practice and Procedure* § 1296 (1990) (same). Even cut off from the fruit of depositions and other discovery against the defendant and her colleagues, plaintiff will often be able to depict a selective pattern of decisions that, without evidence of a more complete set of comparable ones, and extensive explanation by one or more

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[5] Judge Edwards is correct that neither the Solicitor General nor the government defendants advocated the "clear and convincing" standard, see Edwards Op. at 11, but the difference between that and what the Solicitor General did advocate appears to be mainly that his proposed standard is formulated in language that has much less experience and tradition behind it.

decision-makers, will look fishy enough that a jury could reasonably find illicit motive by a preponderance.

Second, *Harlow* plainly views the costs of error in the grant or denial of relief in such cases as asymmetrical. The decision expressed a strong concern about the social costs of damages litigation against officials—namely (to repeat), the conventional costs of litigation, the diversion of the officials' time, deterrence of able persons from even accepting public office, and the chilling of officials' readiness to exercise discretion in the public good. Because of those costs the Court adopted a rule categorically denying recovery where, if the truth could be fully known, there was a malicious perpetration of a constitutional violation (but not a violation of a right so clearly established that a reasonable person would have known he was crossing the line). This can only mean that the Court regarded at least some kinds of officer liability (those turning on subjective intent) as ones where, everything else being equal, the social costs of erroneously denying recovery in some cases were exceeded by the combined social costs of (1) litigating and (2) erroneously affording recovery in other cases.

A standard solution to such a difference in costs between two types of error is to adjust the standard of proof. Criminal law is the best known example, where it is seen as better to allow quite a few actually guilty defendants—perhaps many, in fact—to go free than for one innocent one to be convicted; ergo, the reasonable doubt standard. See, e.g., *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); cf. 4 William Blackstone, *Commentaries* *358 (explaining two-witness rule in perjury cases). But civil law contains frequent applications of a more modest tilt, a requirement that the party seeking to mobilize the state to alter the status quo prove his case by clear and convincing

evidence. Courts have set that hurdle in deportation proceedings, *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966); denaturalization proceedings, *Schneiderman v. United States*, 320 U.S. 118, 123 (1943); civil commitment proceedings, *Addington v. Texas*, 441 U.S. 418, 423 (1979); cases involving termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 756 (1982); defamation suits against public figures, *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964); and a variety of other civil cases such as civil fraud, lost wills, and oral contracts to make bequests, see *Woodby*, 385 U.S. at 285 n.18 (citing 9 *Wigmore on Evidence* § 2498 (3d ed. 1940)). Although we understand the specific standards urged by defendants and the United States ("strong evidence" and "strong inference") to be aimed at similar concerns, we do not pursue them because of their uncertainty compared to the familiar clear and convincing standard.[6]

We pause to note a relationship between (1) the costs of litigation regardless of outcome and (2) a different societal valuation of the two types of error. Where the social costs of litigation itself are exceptionally high, assuming no difference at all in societal valuation of the two different types of error, that *alone* could be a ground for a tilt against the party seeking to alter the status quo. Because a reduction in the probability of success reduces the incentives to bring suit (everything else being equal), such a tilt will automatically reduce the aggregate costs of the affected class of lawsuits—at some cost in increasing the number of good

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[6] The "strong inference" standard is used by the Second Circuit in securities fraud cases under Fed. R. Civ. P. 9(b). See, e.g., *Acito v. Imcera Group*, 47 F.3d 47, 52 (2d Cir. 1995); *Shields v. Citytrust Bancorp*, 25 F.3d 1124, 1127-28 (2d Cir. 1994).

claims that go uncompensated.[7] Accordingly, imposition of a clear and convincing standard may imply (1) simply a perception that the type of litigation involves unusually high costs (so that a tilt against its initiators will decrease its incidence, the court regarding the increase in denials of recovery as an acceptable cost), or (2) a conclusion that errors in defendants' favor are independently to be preferred to errors in plaintiffs' favor, or (3) some combination of the two. If the *holding* of *Harlow* represented nothing else, it surely manifested either the first or third of those possibilities; after all, in one stroke it destroyed an entire group of claims for what was, by hypothesis, unconstitutional behavior.

The cases applying a clear and convincing evidence standard frequently allude to the second of these rationales (which of course is encompassed in the third). As the Court observed in *Addington*, a standard of proof both "indicate[s] the relative importance attached to the ultimate decision" and also "serves to allocate the risk of error between the litigants." 441 U.S. at 423; see also *Santosky*, 455 U.S. at 755 (citing *Addington*); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 283 (1990) (same). The Court illustrated this rationale in *New York Times Co. v. Sullivan*, quoting a Kansas Supreme Court case to support its actual malice standard: " "[O]ccasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.' " 376 U.S. at 281 (quoting *Coleman v. MacLennan*, 78 Kan. 711, 724 (1908)). The Supreme Court has used such

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[7] Of course, many plaintiffs in civil rights actions against public officials know that their chances of success on the merits are minimal and may be motivated by purposes other than achieving that success. The tilt makes it easier for district judges to end such cases quickly, thereby reducing the burdens on the defendant and the court that concerned the Court in *Harlow*.

terms in discussing special gradations of proof. *Woodby*, 385 U.S. at 284-85; *Addington*, 441 U.S. at 423-25; *Santosky*, 455 U.S. at 755.

In developing the *New York Times* rule of clear and convincing evidence, the Court explicitly drew on the reasoning of *Barr v. Matteo*, 360 U.S. 564, 571, 575 (1959), in which it had extended and explicated absolute officer immunity for certain types of official acts. 376 U.S. at 282. It recited *Barr*'s entire litany of social costs of officer liability—essentially those later invoked in *Harlow*—as a parallel justifying its adoption of the *New York Times* rule. *Id.* If a heightened standard of proof—clear and convincing evidence—was a sound remedy in the area of public figure defamation, we think it is equally so in the cognate area of officer damage liability for constitutional torts based on improper motive.

Heightened standards of proof of course apply equivalently at summary judgment and at trial, as a seamless web. In *Anderson v. Liberty Lobby, Inc.* the Court made clear that just as the reasonable doubt standard for criminal trials implies its use in judicial evaluation of motions for acquittal, the clear and convincing standard for trial of malice for purposes of public figure defamation must imply "a corresponding effect" for motions for a directed verdict and for summary judgment. 477 U.S. at 252-54.[8]

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[8] Once the plaintiff has come forward with evidence that a jury could regard as clear and convincing proof of the defendant's unconstitutional motive, his access to discovery on all issues (including motive) would be, in the view of the judges in the plurality, a matter for the district court to determine as in ordinary civil litigation. In other words, although the plaintiff would get no discovery unless he had in hand evidence that would support a jury finding in his favor

What of the pleadings? The label "heightened pleading" for special requirements for constitutional torts involving improper motive was always a misnomer. A plaintiff is not required to anticipate the defense of qualified immunity in his complaint, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), and under the Federal Rules of Civil Procedure is required to file a reply to the defendant's answer only if the district court exercises its authority under Rule 7(a) to order one. At stake has always been the ability of the plaintiff to inflict on the defendant officer liability and the serious burdens of litigation itself—discovery and trial. Although we understand the arguments of the court in *Schultea v. Wood*, 47 F.3d 1427, 1432-34 (5th Cir. 1995), supporting a rule that where qualified immunity is raised in a case involving illicit motive the district court's discretion *not* to order a reply "is narrow indeed," we do not see why the limit on discovery and the standard of proof discussed above would not adequately fulfill the implications of *Harlow*. Of course court-ordered replies and motions for a more definite statement under Rule 12(e) may simplify and speed the process, but we do not see that protection of substantive rights requires any special rules.

We note briefly the argument of the American Civil Liberties Union as amicus, drawing on the recent decision in *Johnson v. Jones*, 115 S. Ct. 2151 (1995). In *Mitchell v. Forsyth* the Supreme Court applied the "collateral order" doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), to hold that immediate appeal was available for "denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity." 472 U.S. at 527. In *Johnson* the Court expressly limited *Mitchell* to pure issues of law, *id.* at 2156, such as the determination that a set

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on the motive issue, if he did have that evidence he could use discovery to obtain additional evidence that might help him win the battle of persuasion at trial.

of given facts constituted a violation of clearly established law, *id.* at 2159. This made clear that appeals from denials of summary judgment were not available for questions of evidentiary sufficiency. *Id.* at 2156; see also *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996) (explicating *Johnson*). The Court was especially concerned that allowing interlocutory appeals of factual questions about intent "may require reading a vast pretrial record, with numerous conflicting affidavits, depositions and other discovery materials" and would result in unjustifiable delay for the plaintiff. *Johnson*, 115 S. Ct. at 2158.

The ACLU argues that *Johnson* concluded that where a dispute about material facts exists in a constitutional tort case, "the goal of shielding defendants from discovery or trial yields to the usual goals of resolving cases on their merits through normal procedures." But *Johnson* is not remotely so sweeping. As the Court observed in *Behrens*, "Every denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact." 116 S. Ct. at 842. The question for purposes of immediate appealability is whether the point at issue is mere sufficiency of the evidence or "more abstract issues of law." *Johnson*, 115 S. Ct. at 2158; *Behrens*, 116 S. Ct. at 842. The Court never addressed (or even hinted at) any adjustment in the summary judgment standards for constitutional torts involving improper motive under *Harlow*. Indeed, no court of appeals thus far has abandoned its special standards in constitutional motive cases in light of *Johnson*. See, e.g., *Moore v. Valder*, 65 F.3d 189, 195, 196 & n.13 (D.C. Cir. 1995); *Morin v. Caire*, 77 F.3d 116, 121 (5th Cir. 1996); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995); *Hervey v. Estes*, 65 F.3d 784, 788-89 (9th Cir. 1995); *Gehl Group v. Koby*, 63 F.3d 1528, 1535 (10th Cir. 1995). And, of course, this court recognized the distinction drawn in *Johnson before* that case was decided, see *Crawford-El v. Britton*, 951 F.2d at 1317 (no immediate

review available for district court's treatment of an "I didn't do it" defense on summary judgment); see also *Johnson*, 115 S. Ct. at 2154 (listing *Crawford-El* among the decisions on the side that *Johnson* found correct), yet nonetheless applied special standards. More generally, so far as we know, most if not all trial court proceedings over claims requiring clear and convincing proof plod along without any application of the collateral order doctrine. Limits on the reach of that doctrine of course mean delay in the correction of trial court error and a resulting increased exposure of officials to some adverse consequences, but we do not see why every fine-tuning that limits the immediacy of appeal should connote some anti-defendant shift in the principles to be applied by the district court.[9]

Application to Crawford-El

As we have seen, the district court *dismissed* Crawford-El's Fourth Amended Complaint under the "heightened pleading" requirement. If dismissal of the complaint were the sole means available to protect defendants from discovery barred by *Harlow*, then we would confront the issue of whether Rule 8's minimalist standard ("a short and plain statement of the grounds") could be applied to the sort of complaints here at issue without violating 28 U.S.C. § 2072(b)'s ban on the exercise of rulemaking power to

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[9] Judge Edwards accuses the plurality of insufficient "judicial restraint," Edwards Op. at 14, but it is not clear by what standard one resolution of a question unanswered by *Harlow* is more or less "restrained" than another. Nor is it clear why one should view a book review by a member of the plurality, see *id.*, suggesting that courts take a modest role in monitoring the judgments of the political branches, as contradicting an opinion whose tendency (among the various plausible alternatives) is to do exactly that.

"abridge, enlarge or modify any substantive right." See *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. at 166-67 (leaving open question of whether courts are to apply "heightened pleading" requirement to claims against government officials). But we see no reason why the government officials' insulation from discovery would not be amply protected by the principle we have already described, entitling officials to summary judgment resolution of their qualified immunity claims before discovery. That being so, it is unclear how application of conventional pleading standards could amount to the sort of substantive abridgement forbidden by § 2072(b). Accordingly, we think it was not correct for the district court to apply, literally, a heightened pleading standard, quite apart from the invalidity of our now-abandoned direct evidence rule.

Quite obviously, however, the court and the litigants have been caught in a vortex of changing standards. And although the defendants have not moved for summary judgment since the filing of the Fourth Amended Complaint, it seems sure that they will do so. Moreover, plaintiff has been on notice at least since our 1991 decision of the need for "nonconclusory allegations that are sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Crawford-El*, 951 F.2d at 1317 (quotations and citations omitted). Accordingly, it seems overwhelmingly likely that the Fourth Amended Complaint represents at least a very close approximation of what Crawford-El can advance in resistance to the motion for summary judgment. In the unusual context of this case, then, we are hardly giving an advisory opinion when we consider whether affidavits embodying the assertions of the Fourth Amended Complaint could successfully withstand Britton's

motion for summary judgment, backed by the affidavit she has already filed.

1. *Whether Crawford-El Has Alleged a First Amendment Violation.* We first examine whether Crawford-El's allegations could possibly constitute a violation of a clearly established constitutional right. See *Siegert*, 500 U.S. at 227 (question whether the conduct complained of constitutes violation of clearly established law is at an "analytically earlier stage" than question of heightened pleading standard); see also *Kartseva v. Dep't of State*, 37 F.3d 1524, 1530 (D.C. Cir. 1994) (same); *Moore v. Valder*, 65 F.3d at 195 (same). Although the question is close, we hold that withholding Crawford-El's property in retaliation for exercise of his First Amendment speech rights would indeed be a violation of clearly established law.

We must answer two questions here: (1) whether Crawford-El's speech was protected under the First Amendment such that retaliation would be violation of a clearly established right and (2) how great the retaliatory injury must be. We start with the first. The Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78, 88 (1987), summarized existing precedent—including *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974), and *Pell v. Procunier*, 417 U.S. 817, 822 (1974)—and set out the test controlling here: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Although on its face *Turner* applies only to regulations, several other courts have applied the test to other prison actions, including those in retaliation cases. *Frazier v. Dubois*, 922 F.2d 560, 562 (10th Cir. 1990) (applying *Turner* in a First Amendment retaliation case); *Jackson v. Cain*, 864 F.2d 1235, 1248 (5th Cir. 1989) (same); cf. *Cornell v. Woods*, 69 F.3d 1383, 1388 (8th Cir. 1995) (in First

Amendment retaliation case, applying *Pell v. Procunier*, 417 U.S. at 822 ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.")). Several cases have held that a prisoner's right to have access to the press may be limited. *Pell v. Procunier*, 417 U.S. at 835 (upholding prison regulation prohibiting face-to-face media interviews with particular inmates designated by the press); *Kimberlin*, 6 F.3d at 791 n.6 (upholding under *Turner* warden's policy prohibiting prisoner press conferences and limiting prisoners' press access to settings expressly authorized under prison regulations). But no court has held that a total ban on communications to the press passes muster. Cf. *Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971) (striking down ban on prisoner letters to news media insofar as the letters concerned prison matters; emphasizing that prison conditions are "an important matter of public policy" about which prisoners are "peculiarly knowledgeable"). And in light of *Turner* and related cases, retaliation against Crawford-El for criticism of the prison administration that was truthful, and not otherwise offensive to some penological interest (so far as appears), would have violated a clearly established right of which a reasonable prison official would have known. Cf. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 571-72 (1968) (holding that First Amendment precludes dismissal of a school teacher who criticized Board of Education's handling of a bond issue; public employees should be able to speak freely on issues of public concern without fear of retaliation).

As to the sort of injury cognizable under the First Amendment, Crawford-El here alleges the costs of replacing underwear, tennis shoes, soft shoes, and other items; shipping charges to get his papers back; and mental and emotional distress. In our earlier opinion in this case, we noted that some non-de minimis showing of injury is necessary in a

constitutional tort action, 951 F.2d at 1321, 1322, and cited *Ingraham v. Wright*, 430 U.S. 651, 674 (1978) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned."), and *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). *Bart* stated that "even in the field of constitutional torts *de minimis non curat lex*." *Id.* "It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise"—for example, a supervisor frowning at an employee in retaliation would not constitute sufficient injury. *Id.* Still, the effect on freedom of speech of retaliations "need not be great in order to be actionable." *Id.*; cf. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306-311 (1986) (out-of-pocket and mental distress damages recoverable for violation of Due Process Clause and First Amendment right to academic freedom); *Hobson v. Wilson*, 737 F.2d at 61-62 (mental distress damages recoverable for violation of First Amendment right of political association); *Frazier v. Dubois*, 922 F.2d at 561 (transfer of prisoner in retaliation for exercise of First Amendment rights is unconstitutional injury; citing cases).

The district court commendably latched onto our approval of *Bart* and applied a sensible standard—whether an official's acts "would chill or silence a "person of ordinary firmness' from future First Amendment activities." Mem. op. at 13 (quoting *Bart*). The court then found that the pecuniary losses Crawford-El sustained in the form of the costs of shipping his boxes and replacing clothing, though small, might well deter a person of ordinary firmness in Crawford-El's position from speaking again. We agree that the acts asserted pass that test.

2. *Whether a Jury Could Reasonably Find Clear and Convincing Evidence of Retaliatory Action.* The Fourth Amended Complaint alleges a variety of encounters between

Crawford-El and Britton from which plaintiff believes it can be inferred that the misdelivery of his goods must have been in retaliation for various activities that are protected by the First Amendment.

Crawford-El sets the stage with allegations that Britton was hostile to him because of his actions on behalf of fellow prisoners even before his contacts with the press. While he was Clerk for the Occoquan Facility Housing and Adjustment Board at Lorton (from about October 1985 to April 1986), he had frequent contact with Britton since she often served on that Board and Crawford-El often went to the nearby block containing Britton's office to photocopy. He claims that Britton, while despising all prisoners, was particularly hostile to him because he had been in charge of the law library when housed at the central facility at Lorton and had helped many prisoners prepare administrative grievances. According to Crawford-El, Britton deemed him "too big for his britches."

In April 1986 Crawford-El apparently invited reporters from the *Washington Post* to visit the prison, correctly noting on the visitor application form submitted to Britton that the proposed visitors' address was 1150 15th Street, NW, Washington, DC 20071, but discreetly omitting that this was the *Post*'s address. Britton approved the application. A reporter came, and on April 20, 1986 the *Post* published a front-page article under the headline "Jail Crisis Spills Into Occoquan Unit," subheaded "Crowding, Anger Grow as D.C. Inmates are Shifted to Va. Facility." It quoted Crawford-El's account of an alleged irregularity—that on his arrival at Occoquan a correctional officer had obtained trousers for him by searching in other prisoners' lockers for an extra pair. The next day, says Crawford-El, Britton called him into her office and told him he had "tricked" her and that "so long as [Crawford-El] was incarcerated she was going to do everything she had to to make it as hard for him as possible."

Between April 1986 and Crawford-El's next successful use of the press, he brought a variety of lawsuits against the District. In one, for property allegedly lost through prison officials' negligence, he recovered about $500; in three others he complained on behalf of himself and a class about the lack of food compatible with prisoners' Islamic beliefs, alleged interference with his religious beliefs, and sued, curiously, "for legal malpractice." In December 1988, while the suits were pending, he and a group of other prisoners were transferred to the Spokane County Jail. While assembled for the trip in shackles, the prisoners were videotaped. Plaintiff says that he and others protested the videotaping as a violation of their privacy rights, to which Britton responded, "You're a prisoner, you don't have any rights."

Shortly after arrival at Spokane, Crawford-El again spoke with a reporter from the *Post*. On December 18, 1988, another front-page article appeared, "Sudden Move Severs Inmates' Ties to D.C.; Isolation of Spokane County Jail Puts Prisoners "In a Firecracker Mood.' " It credited Crawford-El with the firecracker metaphor and also quoted him as claiming that the prisoners sent to Spokane were "the civil litigants of Lorton who have been put here to get us out of their hair so our lawsuits will be dismissed on procedural grounds." Shortly after the publication of this article, according to Crawford-El, Britton told a Spokane County Jail official that Crawford-El was "a legal troublemaker," meaning, according to the complaint, "a prisoner who asserts her or his legal rights, or seeks administrative or judicial redress of grievances." As we noted before, "even prison officials free of hostility toward Crawford-El might regard "troublemaker' as an apt moniker." *Crawford-El*, 951 F.2d at 1319.

The alleged retaliatory act—the misdelivery of boxes—occurred in the course of Crawford-El's transfer back from Spokane to Lorton and thence on to a federal prison in

Marianna, Florida, a transfer over which Britton had charge. At Spokane, Crawford-El was instructed to give his property to officials there for forwarding to him. Crawford-El alleges Britton was aware of the boxes' importance to him, saying that when he and two other prisoners met Britton on August 18, 1989 at the Western Missouri Correctional Center en route back to Lorton, they told her that their boxes contained legal papers needed for ongoing cases. She allegedly said that she understood Crawford-El's need for the personal property and legal materials and that the boxes would be sent to her office.[10] (In her affidavit Britton contests the claim that she was ever told of the papers: "I do not recall plaintiff telling me that there were legal documents in his personal property, nor did I have knowledge of the contents of the three sealed boxes." She said she had the boxes sent to her office to keep them from being lost.)

In late August, after arriving back at Lorton, Crawford-El allegedly wrote to Britton requesting that his property be sent to him as soon as she received it. Shortly afterward, he noticed that some other prisoners returning from Washington State had got their property. Just before he was transferred, he checked with a Lorton "Property Officer" named Ward, who told him that he could have his property sent to him at his final destination by writing a request to that effect after arrival at that final destination. At still another intermediate stop, the federal prison in Petersburg, Virginia, Crawford-El learned from other D.C. prisoners that Britton had been calling their families asking them to pick up the prisoners' property because otherwise she would throw it away. He

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[10] On the trip back to Lorton, supervised by Britton, the property Crawford-El was carrying with him (and that of other prisoners as well) was put into storage on the bus and apparently lost. Crawford-El won an uncontested small claims court suit against Britton for $72.50 based on this loss.

called his parents, who told him his brother-in-law Jesse Carter had picked up his boxes. (Crawford-El was "upset" at this, since he believed he would have difficulty getting permission to receive the property once it had left the prison system.) According to Crawford-El's own allegation in the Fourth Amended Complaint, Carter told Crawford-El that Britton had told him that she was concerned about Crawford-El's legal materials and other property and was afraid the boxes would be lost if she sent them to the Lorton Property Officer for mailing to Crawford-El, and that federal prisons would not accept shipments of D.C. prisoner property. That account meshes with Britton's affidavit, which says that she asked Carter to take Crawford-El's property "only to insure its safety and protection from loss, and for no other reason whatsoever." (Britton also stated that "we had been advised by the Federal Bureau of Prisons that they would not accept the personal property of the prisoners.") But Crawford-El also says that Britton told Carter that Crawford-El "should be happy she did not throw [his property] in the trash."

In the course of Crawford-El's attempts to get his property back, his lawyer received a copy of a letter from the Corporation Counsel's office, stating:

> As has been our past practice, inmates transferring from DCDOC [the D.C. Department of Corrections] to BOP [the federal Bureau of Prisons] custody are permitted only a small amount of personal property which should be limited to personal care items and legal documents.

The letter also said that there were "significant differences among DCDOC and BOP property policies and differences between individual BOP facilities" and noted that "[i]n special cases, we ask that DCDOC contact individual facility Inmate Systems staff for permission prior to mailing any inmate personal property to a BOP facility." Though Crawford-El's

mother forwarded the boxes on to him at the prison at Marianna, Florida, Crawford-El had some difficulty getting them, as he had expected. Crawford-El asserts that this was because they arrived outside prison channels.

The allegations supplying the strongest evidence of Britton's alleged malign intent are her threat to Crawford-El after the 1986 *Post* article to make things "as hard as possible for him" and her remark to Carter about throwing the boxes in the trash. But those comments—for both of which Crawford-El is the only source mentioned—are suspect as self-serving assertions. The complaint undermines the "trash" comment by affirmatively asserting that Carter said Britton told him she was giving him the property out of concern about its getting lost, an account that Britton's affidavit supports. As for the allegation that Britton told a Spokane County Jail official that Crawford-El was "a legal troublemaker," the complaint itself defines that term in such a way as to make it impossible to deny that the description is apt. The letter by Corporation Counsel on its face suggests some confusion about the federal Bureau of Prisons policy concerning transfer of D.C. inmate's personal property, reducing the likelihood that Britton's handing the property to his brother-in-law was a deliberate scheme to keep it away from Crawford-El. Indeed, in the absence of some reason to believe Britton thought Carter had it in for Crawford-El or was hopelessly incompetent (neither of which is claimed by Crawford-El), or thought that federal prison officials would much more readily allow Crawford-El to receive the property if sent by the D.C. Department of Corrections than if sent from outside the prison system, transfer of the boxes to the brother-in-law makes an awkward fit with any serious purpose to keep them from Crawford-El. In addition, Crawford-El's own complaint states that Britton had telephoned other D.C. prisoners' families to ask them to pick up those prisoners' property at Lorton—behavior further

reducing the chance that Britton's treatment of Crawford-El had any retaliatory purpose. In short, a jury could not reasonably find that Crawford's nonconclusory assertions constitute clear and convincing evidence of unconstitutional intent. On remand, Crawford-El may attempt to bolster his evidence—perhaps in part through discovery, if by amplifying his independent assertions he secures district court permission to conduct discovery pursuant to Judge Ginsburg's separate opinion, which is controlling on the issues as the opinion consistent with the disposition on the narrowest grounds, i.e., a "common denominator" of the reasoning of the majority, see *King v. Palmer*, 950 F.2d 771, 780-81 (D.C. Cir. 1991) (en banc)). If he adds no evidence, the district court should grant any future motion for summary judgment by Britton on the federal claims against her.

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Accordingly we vacate the dismissal of Crawford-El's First Amendment retaliation claim against Britton, and the pendent conversion claim (see *supra* note 1), and, once the panel has resolved the issues between Crawford-El and the District (see *id.*), remand the case to the district court for further proceedings.

So ordered.

SILBERMAN, *Circuit Judge, concurring*: Crawford-El, a D.C. prisoner serving a life sentence for murder and a chronic litigant whom we have previously described as a "trouble maker," *Crawford-El v. Britton*, 951 F.2d 1314, 1320 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 818 (1992), has brought a damage claim (now amended four times) against a prison official who allegedly retaliated against him for the exercise of his constitutional rights to bring innumerable law suits (and talk to the press) by allowing his boxes of "legal material" to be picked up by his *brother-in-law* (horrors!) when the plaintiff was transferred from one prison to another.

There was a time, not too many years ago, when any American lawyer or judge hearing that such a case was the subject of an *en banc* hearing in a federal court of appeals, even that it plausibly could be brought as a claim in a federal district court, would have been incredulous. Before I discuss what I believe to be the appropriate resolution of the case—given the state of present law on qualified immunity of government officials—I think it worthwhile to trace the jurisprudential steps that have led us to this situation. Particularly is this so because some justices have expressed legitimate concerns about the degree of judicial "policymaking" implicated in fashioning the substantive and procedural framework of qualified immunity, *see Wyatt v. Cole*, 504 U.S. 158, 171-72 (1992) (Kennedy, J., concurring, joined by Justice Scalia);[1] *see also* Chief Judge Edwards' Sep.

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[1] Qualified immunity is not a new innovation and some have expressed concern insofar as it has been extended beyond its common-law boundaries. But at common law, we did not have constitutional torts as such. Moreover, pre-trial discovery in the nineteenth century was not burdensome (in sharp contrast to our current system) due to the severe restrictions placed on it, if it was allowed at all, even in the most permissive of states. *See* Wolfson, *Addressing the*

Op. at 14-15, overlooking the much more fundamental—and troublesome—judicial policymaking involved in creating the causes of action that have given us the problem.

I.

Federal damage actions that typically raise qualified immunity concerns are those brought against federal officials as *Bivens* actions or against state officers under § 1 of the 1871 Civil Rights Act (hereinafter § 1983). Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). Ironically, § 1983 was the least controversial provision in the 1871 Act, attracting little attention or debate. And for almost 100 years the federal courts read that statute as it was clearly intended, to attack the so-called "Black Codes" passed by Southern states after the civil war, not private torts. *See, e.g., Lane v. Wilson*, 307 U.S. 268 (1939); *Brawner v. Irvin*, 169 F. 964, 968 (C.C.N.D. Ga. 1909) (dismissing case that alleged that the police chief had whipped petitioner for striking his relative since it alleged only a private tort). But in 1961 in *Monroe v. Pape*, 365 U.S. 167, the Supreme Court extended the statute to reach the behavior of Chicago police officers who did not

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Adversarial Dilemma of Civil Discovery, 36 CLEV. ST. L. REV. 17, 25-27 (1987).

claim their actions were sanctioned under state law. Indeed, there was little doubt that the plaintiffs had a tort remedy under Illinois law. But as is so often true when the Supreme Court hands down a decision that substantially expands federal judicial power, the facts were dramatic: thirteen Chicago police officers broke into the Monroes' apartment, forced the Monroes to stand naked at gunpoint in the middle of their living room, struck their children, and called Mr. Monroe "nigger" and "black boy." *Id.* at 203 (Frankfurter, J., dissenting in part). The Court overrode what seems to me to be the characteristically impeccable reasoning of Justice Frankfurter (when he was relying on reasoning rather than rhetoric) in dissent, and turned § 1983 into a provision that the post-civil war Congress could not possibly have visualized. *See* Zagrans, *"Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985). The Court's construction effectively read out of the statute the "under color of law" limitation, making it synonymous with the Fourteenth Amendment's state action requirement.[2] Subsequently, the Court discovered a whole series of new constitutional rights and applied the Bill of

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[2] The Court's interpretation of "under color of law" has not been its only creative interpretation of § 1983. It has allowed litigants to use § 1983 to enforce statutes that have no connection to the Fourteenth Amendment or the post-civil war civil rights legislation. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). The Court was not discomforted that its interpretation would result in the scope of § 1983 being vastly greater than its jurisdictional counterpart (which was the only conceivable basis for § 1983 suits until § 1331 was passed some years later). The dissent in *Thiboutot* indicated that it is "idiotic" to interpret § 1983 in this fashion. *Id.* at 21 n.9.

Rights to the states.[3] As a result, the 296 federal civil rights actions against government officials filed in 1961 have exploded into over 40,000 by 1988, over half of which were filed by prisoners. In just the period between 1975 and 1984, the number of prisoner civil rights cases increased by approximately 200%, from 6,606 to a staggering 18,856. *See* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 667 (1987). In contrast, there were only 21 cases decided under § 1983 in its first 50 years. *See Comment, The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

Then, in 1971 the Court, in perhaps an even more stunning exercise of judicial policymaking, fashioned a federal cause of action for damages against *federal* officials for a "constitutional tort." In *Bivens v. Six Unkown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the facts were again grim; six federal law enforcement officials without a warrant broke into the apartment of the plaintiff to conduct a search. He was arrested in front of his wife and children—who were also threatened with arrest—for a narcotics violation and was subsequently interrogated, searched, and booked. The case against him was ultimately dismissed. *Bivens* reflected the Court's *policy* proclivity to "equalize" the obligations of constitutional law imposed on state government to those imposed on federal government. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Butz v. Economou*, 438 U.S. 478, 501-03 (1978).

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[3] In fairness, "incorporation" of the Bill of Rights had begun a long time before. *See, e.g., Smyth v. Ames*, 169 U.S. 466, 525-26 (1898) (applying the "Takings Clause" to state rate regulation of railroads).

To be sure, prior to 1875 and the passage of the general federal question jurisdiction statute, an injured party could bring a common-law suit in state court against a governmental actor. The governmental official would then raise as a defense that he was acting pursuant to a statute or authority vested in him—a defense which could be defeated by showing that the statute or delegated authority was unconstitutional. For instance, the Fourth Amendment's prohibition against unreasonable searches and seizures was enforced by bringing a common-law trespass action against a governmental official, an action which an official could not defeat by invoking a claim of authority violative of the Fourth Amendment.[4] *See Boyd v. United States*, 116 U.S. 616, 626-27 (1886). Of course, there was no *a priori* assurance that there would always be a common-law right guaranteeing a remedy for an official's unconstitutional action (although there normally would be), but this is only a problem if one thinks that there is an *a priori* reason to believe that every constitutional violation must be remedied. Our historical practice simply does not support the proposition that the Constitution is self-executing. *Cf. Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J. dissenting) (explaining that it is "untenable that there must be a judicial remedy for every constitutional violation").[5]

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[4] In actions for trespass, the defendant would typically seek damages against the trespasser. *See, e.g., Huckle v. Money*, 95 Eng.Rep. 768 (1763). While one might be tempted to argue that since the framers envisioned the Fourth Amendment being enforced through actions for damages—where the Fourth Amendment negated the government official's defense—the important point is that the underlying cause of action was a creature of state law.

[5] One should keep in mind that even under the most narrow construction of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it

After 1875, the Court started down a different path. It gradually concluded that an implied cause of action under the Constitution existed where the remedy sought was an injunction. The Court by "almost imperceptible steps ... appears to have come to treat the remedy of injunction as conferred directly by federal law for any abuse of state authority which in the view of federal law ought to be remediable." Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954). This process culminated in *Ex Parte Young*, 209 U.S. 123 (1908), in which the Court upheld an injunction of a state official where the alleged wrong was the threat of future prosecutions. Whatever the validity of this reasoning in an era when the courts had license to create general federal common law, *see Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), there is no question that the Court's finding of an implied right to an injunction against a government official in his *official* capacity is on far more solid ground than the creation of an implied right to *damages* against a governmental official *as an individual*. After all, the Constitution (with a few exceptions such as the Thirteenth Amendment) is concerned with limitations on the power of government. Individuals are implicated only insofar as they act as agents of the government as opposed to private tortfeasors. Moreover, the Court has for the last hundred years consistently followed this line of reasoning in finding an implied right to an injunction; *Bivens* suits lack such a pedigree.[6] *See, e.g., Davis v.*

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is inevitable that some meritorious suits will be barred. This should not be surprising since the very notion of an "immunity" from suit, as opposed to a "defense," entails that valid constitutional claims will be barred.

[6] The Court has implied a damages remedy in order to enforce the Fifth Amendment's prohibition on the taking of private property for public use without just compensation. *See*

Passman, 442 U.S. 228, 241-43 (1979) (explaining this tradition); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996); Collins, "*Economic Rights*," *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1510 (1989). The availability of the historically recognized right to injunctive relief obviates the need for a judicially-created damages remedy. As Justices Frankfurter and Brandeis explained (and as implicitly recognized by Justice Harlan in his *Bivens* concurrence) "remedies" are independent of "rights." Remedies can vary based on the weighing of numerous policy considerations

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Jacobs v. United States, 290 U.S. 13 (1933). However, the damages remedy was against the *government* and has explicit textual support in the Amendment's requirement that "just compensation" be paid. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (citing cases that "make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking").

Some have argued that the Court after 1875, even if rarely, also implied a personal damages remedy. In most of these cases, the Court seems to have conceived of the cause of action, although admittedly sometimes artificially, as based upon the common law. In *Wiley v. Sinkler*, 179 U.S. 58 (1900), and *Swafford v. Templeton*, 185 U.S. 487 (1902), the two most cited examples of this implied damages remedy, the Court concluded that the lower federal court had federal question jurisdiction to entertain a suit for damages against state officials for their interference with the plaintiffs' right to vote in federal elections since it involved the construction and application of the Constitution. The Court in these cases was focused on whether the suits raised federal questions, not the legitimacy of the damages remedy, although the two questions admittedly do overlap.

even while the right being enforced remains the same. *See Truax v. Corrigan*, 257 U.S. 312, 354-57 (1921) (Brandeis, J., dissenting); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 205-223 (1930). The lack of a damages remedy does not denigrate or change the nature of the underlying right.

The point to bear in mind then, before turning to the qualified immunity question, is that the causes of action that largely create the problem that qualified immunity addresses were not created by Congress; they were devised by the Supreme Court without any legislative or constitutional (in the sense of positive law) guidance. Justice Harlan candidly admitted in his concurring opinion in *Bivens*, and as subsequently affirmed by the whole Court, *see Bush v. Lucas*, 462 U.S. 367, 376-78 (1983), that the Court, in crafting a remedy, feels free to take into account the range of policy considerations "at least as broad as the range of those a legislature would consider." 403 U.S. at 407. As Justice Rehnquist pointed out in dissent in *Carlson v. Green*, 446 U.S. 14, 36 (1980), this quasi-Article I legislative function of open-ended balancing of different policy considerations and goals is ill-suited for the judiciary.[7] The best solution to the whole problem would be the flat overruling of both *Bivens*—as Justice Rehnquist called for in *Carlson*—and *Pape*, putting the issue of damage remedies against state or federal officials for constitutional torts where it belongs—with states and Congress. But since the Supreme Court, in accordance with public choice theory, *see generally*

[7] To the extent that the *Bivens* Court relied on the Court's authority to infer private damages remedies in the face of statutory silence, *see Bivens*, 403 U.S. 388, 398 (Harlan, J., concurring), this has been undermined by subsequent case law. *See Carlson*, 446 U.S. at 39 n.5.

J. BUCHANAN & G. TULLOCH, THE CALCULUS OF CONSENT (1962) (arguing that all rational actors, including those in government, pursue power), follows its own version of the Breznev Doctrine—no significant retreat from extensions of federal constitutional power (unless perhaps, if confronted by Congress)—that is a vain hope.[8]

II.

As I have indicated, shocking factual allegations played no small part in the development of the law in *Pape* and *Bivens*. (Many journalists and lawyers describe as a virtue a hypothetical Supreme Court justice's disposition to decide in accordance with the facts of a particular case; they mean the justice should decide how the dispute should be resolved using a Solomonic policy-oriented methodology and then the law should be fashioned to accommodate that resolution.) It is hard to imagine a similar outcome in either case if facts akin to Crawford-El's had been presented. In other words, if *Pape* or *Bivens* had involved constitutional tort claims that depended on allegations that the actor's *motive* was proscribed, I am confident that the Supreme Court would not have gone down either path, especially in light of the probative difficulties that motive-based wrongs necessarily involve, because virtually any ostensibly legal action taken by a government official can be thought unconstitutional if prompted by an unconstitutional motive.

Viewed in this light, Judge (now Justice) Ginsburg's "heightened pleading" requirement that a plaintiff allege *direct* evidence to show an unconstitutional motive for actions that would otherwise be perfectly legal might be thought an effort to keep a *Bivens* claim close to the kinds of facts that moved

[8] It could be argued that the Supreme Court's withdrawal from *Lochner* is an exception, but of course substantive due process grew back anew in "politically correct" gardens.

the Supreme Court to create the cause of action in the first place. *See Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987). Theoretically, circumstantial evidence is not inherently weaker than direct evidence, but I think Judge Williams' opinion overstates the matter—by a good deal—when it argues that "we have no reason to think that it did any better as a screen, than, say a random rejection of nine out of every ten claims." Judge Williams' Op. at 10. Since direct evidence of an unconstitutional motive for an ostensible legal act is virtually never available (I do not recall ever seeing such a case since *Martin* was decided), the *Martin* heightened pleading requirement effectively kept *Bivens* unconstitutional motive cases from going to discovery and trial in our circuit for 10 years. That result, no matter how reached, is not only desirable, it is implicitly contemplated, as I explain below, by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Thus, whatever the logical flaws in the direct versus circumstantial evidence distinction or the designation of a "heightened pleading" requirement, I would have been content to hold to *Martin* as precedent—which under Judge Edwards' reasoning would be the most judicially restrained choice—but as long as the court is determined to reexamine the doctrine, I prefer a somewhat different approach than does Judge Williams.

In actual practice, Judge Williams' clear and convincing test applied at the summary judgment stage may well have the same ultimate impact as the *Martin* test. Under both standards, it would appear quite difficult for a plaintiff to gain discovery, let alone a trial, if the government official's bad motivation is the key to making out the constitutional tort. Still, the test as set forth by Judge Williams holds out the prospect of confusion in application. I am not sure I understand just what sort of showing a plaintiff must make to meet the "specific, non-conclusory *assertions* of evidence, in affidavits or other materials suitable for summary judgment"

test. Judge Williams' Op. at 13 (emphasis added). Or how that differs from Justice Kennedy's requirement that "the plaintiff must put forward specific, nonconclusory factual *allegations* which *establish* malice." *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (emphases added). Or how either standard differs from the Seventh Circuit's cryptic phrase "[u]nless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery." *Elliott v. Thomas*, 937 F.2d 338, 345 (1991). For example, would Judge Williams' disposition differ if the plaintiff produced an affidavit asserting that in a private conversation with him the defendant unequivocally stated that she intended to punish him, for his vexing litigation, by giving his "legal papers" to his brother-in-law? Would Justice Kennedy's or Judge Easterbrook's? I fear Judge Williams' approach, while certainly preferable to Judge Edwards',[9] will promise a good deal of further litigation with very little return in providing relief in supposedly meritorious cases.

Judge Ginsburg's approach promises even more confusion—and ungoverned variance among the practice of district judges. By permitting discovery upon a showing based on "specific evidence within the plaintiff's command, that such discovery will uncover evidence sufficient to sustain a jury finding in the plaintiff's favor," Judge Ginsburg asks each judge to use his or her crystal ball rather than a rule of decision. The *ex ante* impact on potential defendants' behavior would not under this formulation differ meaningfully from Judge Edwards' position. In my view it will induce more paralysis than discouragement of wicked actions. It is

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[9] I quite agree with Judge Williams' discussion of *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and also agree that a plaintiff is entitled to discovery for certain other purposes. Judge Williams' Op. at 13-14.

perhaps one of the simplest axioms of law and economics that overdeterrence as well as underdeterrence yields inefficient results. *See* P. SCHUCK, SUING GOVERNMENT 68-75 (1983).

I think the more straightforward solution, following *Harlow*'s reasoning, is to hold that when the defendant asserts a legitimate motive for his or her action, only an objective inquiry into the pretextuality of the assertion is allowed. If the facts establish that the purported motivation would have been reasonable, the defendant is entitled to qualified immunity. *Cf. Halperin v. Kissinger*, 807 F.2d 180, 188 (D.C. Cir. 1986). Although *Harlow* dealt specifically with a different subjective aspect of an official's motivation—his knowledge or appreciation of governing constitutional law—as Judge Williams notes, the Court in *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985), read *Harlow* as having "purged qualified immunity doctrine of its subjective components." *See also Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (explaining that the *Harlow* Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action"). More important, *Harlow* itself unequivocally states that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. That thought certainly strongly suggests that a factual dispute over whether the defendant's otherwise legal action is rendered illegal because of an unconstitutional motive cannot defeat a qualified immunity defense. The *Harlow* Court manifested a clear awareness of the peculiar difficulties that litigation over *any kind* of motivational disputes entail:

> There are special costs to "subjective" inquiries.... In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding

> discretionary action almost inevitably are influenced by the decision maker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment ...

Id. at 816. The Court specifically noted that "petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the "good faith' standard established by our decisions." *Id.* at 814-15. The gravamen of the petitioners' argument was that the qualified immunity available under *Butz* was undermined by district courts which "routinely denied motions for summary judgment on the ground that the claim of malice or bad faith automatically raised a triable issue of fact as to the defendant's state of mind." It would be odd if the Court found this concern persuasive and yet reformulated the qualified immunity inquiry in a way that was not responsive to the difficulty of defeating at summary judgment intent-based constitutional suits. Nor is it at all clear that allowing a government official, as Judge Williams puts it, Judge Williams' Op. at 16, to maliciously perpetrate a constitutional violation (so long as the constitutional right was not so clearly established that a "merely reasonable person" would not have known it) is less "egregious," Judge Williams' Op. at 11, than allowing the same official to take an objectively reasonable action that would be blameless if the defendant's motives were benign. The very logic that leads my colleagues to reject the distinction between direct and circumstantial evidence, it seems to me, could lead to a similar rejection of the distinction between two subjective elements (knowledge of the law and actual motivation) of the constitutional tort/qualified immunity analysis.

Yet, as Judge Williams correctly notes, the circuit courts have shrunk from that interpretation of *Harlow*. They have done so, it appears, because of a concern that has driven much of American jurisprudence in the latter half of the twentieth century; the prospect of a racially discriminatory act. *See, e.g.*, Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV.1255 (1994) (discussing the impact of race on the evolution of criminal law). Thus in *Elliott*, the Seventh Circuit recognized that:

> [c]arrying out the program of *Harlow* seems to imply attributing to the defendants the best intent they (objectively) could have under the circumstances, and asking whether the law at the time clearly establishes that persons with such an intent violate the Constitution. Yet that would be the functional equivalent of eliminating all recoveries when a mental state is part of the definition of the wrong—as it is in cases of *racial discrimination*, excessive punishment, and many other constitutional torts.

937 F.2d at 344 (emphasis added). Similarly, in *Halperin*, where we actually so applied *Harlow*, at least to "national security cases," *see* 807 F.2d at 187-88, we revealingly suggested that to conclude that *Harlow* meant to preclude inquiry into *all* intent would permit a defendant "to discriminate on the basis of race." *Id.* at 186.

Giving *Harlow* its logical extension does not, in my view, present any special problems of encouraging racial discrimination, because, as I will discuss shortly, there are other restraints on discriminatory official action. Therefore, I would extend to all unconstitutional motive actions the principle adopted in *Halperin*, where we held that if the government defendants' actions (wiretaps) in a *Bivens* case would be "validated" by a legitimate national security motive,

the defendants are entitled to immunity if they purport to act for national security reasons, unless a jury could conclude that it was *objectively* unreasonable for the defendants to so act. A simple hypothetical illustrates its ease of application. Suppose a plaintiff claims that a defendant (perhaps a judicial official not covered by Civil Service or Title VII legislation), *see Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990), impermissibly fired her because of her race. The defendant claims that the plaintiff was discharged because of budget constraints. If the defendant's rationale would have been objectively reasonable under the circumstances, the defendant wins on summary judgment. In contrast, if a reasonable trier of fact could find that budget constraints were objectively unreasonable under the circumstances (if, for instance, the official's division recently received a windfall of funds or hired a number of additional workers), the case would proceed to trial.[10] *Cf. Halperin*, 807 F.3d at 189 (noting that the defendants win on summary judgment if they "adduce sufficient facts that no reasonable jury ... could conclude that it was objectively unreasonable for the defendants to be acting for national security reasons").To be sure, as I have noted, in *Halperin* we limited our holding to national security cases, perceiving a particular need to protect the executive branch from probing into motivations that touch such sensitive issues. There the government's wiretap was thought to be unconstitutional unless it was motivated by national security concerns—so it appeared as if it was the government that put motivation at issue. But, I think that formulation is deceptive. Any action, the discharge of a government employee say, could be phrased the same way; as either illegal if motivated by unconstitutional discrimination or constitutional if not.

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[10] Of course, if the government official (or the government) does not deny that the defendant acted with an unconstitutional motive, that is another matter.

Perhaps all the *Halperin* panel meant by the notion of a "validating" intent is that, as a matter of substantive law, the burden was on the government to prove its motivation was driven by national security concerns. But suppose a government agency discharged an employee for alleged national security reasons and the employee claimed it was for racially discriminatory grounds. Judge Williams does not explain whether under such circumstances *Halperin* or his clear and convincing test governs. (Indeed neither Judge Williams, Judge Ginsburg, nor Judge Edwards discusses the relevance of *Halperin* to their respective tests—making it a silent orphan—so it is wholly indeterminate whether it is affected by this *en banc* proceeding.) *Halperin*'s reasoning avoids this analytical difficulty: if the challenged defendants' actions, without regard to their actual intent, are consistent with an objectively reasonably intent, the defendants are entitled to immunity. And even if the defendants are not able to meet this burden, they are still entitled to immunity if they are able to prove that their actual motivation was legitimate.[11]

Judge Ginsburg (and to a lesser extent Judge Williams), although assiduously avoiding a reference to *Halperin*, criticizes my approach as creating inevitable incentives to unconstitutional behavior. But, of course, the same criticism can be made against either of their positions insofar as they strengthen a defendant's hand even fractionally over Judge Edwards' position. There is simply no escape from a

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[11] *Harlow* allows the use of evidence concerning subjective motivation if it *benefits* the government. "[I]f the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." 457 U.S. at 819. The Court then notes, somewhat cryptically, that "[b]ut again, the defense would turn primarily on objective factors."

judgment, without any empirical data, as to where along the spectrum to draw the line between the interests of discouraging unconstitutional behavior and avoiding the peculiar difficulties that the threat of personal damage suits against public officials entail.

In any event, I do not think the matter is quite as simple or self-evident as Judge Ginsburg's downward sloping demand curve. We should bear in mind that in these cases, which often arise in an employment context, the defendant, even if he or she acts in part with a proscribed motive, that motive typically is only a contributing factor to a decision. This has led to terribly complicated jurisprudential efforts to develop techniques to measure the relative importance of the proscribed motive. *Cf. NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as modified by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified and amended in scattered sections of 42 U.S.C. (Supp. V 1993). Take the present case. How would we really distinguish between the defendant's hard feelings (if they could be established) toward the plaintiff because he is a self-evident pest as opposed to the more grandly phrased "because of his exercise of his First Amendment rights"?

The truth of the matter—as most practitioners in the labor and EEO field well know—is that a determination as to the existence and relative importance of an illegal motive is difficult, often artificially relying on certain presumptions. And the behavior of the potential defendant *ex ante* is typically directed at avoiding those indicia of the proscribed motive that will tend to be relied upon in that substantive area of the law. (Can one imagine an employer deciding whether to discharge a employee for theft attempting, perhaps through

yoga, to cleanse his mind of any hostility because of the employee's union status?)

Still, it is difficult to deny that, at least theoretically, Judge Williams' view and even more Judge Ginsburg's position creates a greater disincentive to government officials taking action with an unconstitutional motive than does mine. But, personal damage suits are decidedly not the only disincentive. We should bear in mind of what my colleagues fail to take sufficient account—that there are restraints against such behavior other than § 1983 or *Bivens* damage suits. When officials violate citizens' rights, they expose themselves to disciplinary sanctions, harm to their professional reputations, and reduced opportunities for advancement. *See, e.g.*, SCHUCK, *supra*, at 69. Unlike normal tort law, federal and state officials are sworn to uphold the Constitution; violating one's oath may mean a reputation for deceit and unreliability. Certainly a rational actor would avoid this result, if only to avoid a decrease in his or her value as an employee. *Cf.* Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 967 (1984); R. POSNER, OVERCOMING LAW 109-44 (1995). To the extent an individual fears moral retribution, the oath will further induce proper behavior. I hope I will be forgiven for assuming that such an oath, like a monetary disincentive, can affect the behavior of government officials. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Webster*, 486 U.S. at 613 (Scalia, J., dissenting). Individuals who fear divine punishment also face a downward-sloping demand curve: as the level of sin rises, the punishment increases.

Moreover, a number of federal statutes are aimed at governmental unconstitutional conduct. Even in the absence

of suits for money damages,[12] government officials will be deterred by the threat of criminal prosecution.[13] Government officials possess no general immunity from such actions. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (noting that the Court has "never suggested that the policy considerations which compel civil immunity for certain government officials also place them beyond the reach of the criminal law. Even judges, who have long been cloaked with absolute immunity from damages, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983").

Federal statutes providing causes of action against the government itself—particularly those targeted at

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[12] In addition to § 1983, plaintiffs can sue officials for monetary relief under 42 U.S.C. § 1981 (1994) (civil action for denying persons the "full and equal benefit of all laws and proceedings" guaranteeing security of persons and property); § 1982 (civil action for interference with citizens' property rights on the basis of race); § 1985 (civil action for conspiracy to deprive persons of equal protection of the laws); and § 1986 (civil action for failure to prevent a conspiracy to interfere with § 1985 rights).

Admittedly, as Judge Ginsburg notes, qualified immunity may apply to these actions for money damages as well.

[13] *See, e.g.*, 18 U.S.C. § 241 (1994) (criminal action for conspiracy to "injure, oppress, threaten, or intimidate" a person in the exercise of his constitutional rights); § 242 (criminal action for deprivation of a person's constitutional rights on account of a person being an alien or by reason of his race).

discrimination—provide additional deterrence.[14] The government undoubtedly looks askance to official misconduct that subjects it to liability. *See, e.g.*, Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 PITT. L. REV. 935, 1003 (1989) ("Deterrence ... is most effective at the level where control lies. It is the government and not the individual employee, which has the ability to change policy, discipline misconduct, and require a different kind of training."). And with respect to the actions of state or D.C. officials, there are, as Justice Frankfurter noted, state causes of action for damages.

Insofar as this panoply of remedies contains lacunae, I would leave it to Congress to fill them.[15] The gaps tolerated

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[14] *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2674 (1994) (providing for a cause of action for some federal governmental activity that constitutes a tort under state law); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1988 & Supp. V 1993); Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 (codified as amended in scattered sections of 5 U.S.C. (1994)) (establishing the Office of Special Counsel to investigate and prosecute allegations of supervisory abuse within the civil service disciplinary structure). Age Discrimination and Employment Act, 29 U.S.C. §§ 621-634 (1994) (civil action for employment discrimination based on age); Rehabilitation Act, 29 U.S.C. § 794 (1988) (civil action for discrimination on the basis of disability).

[15] *See, e.g., Bush v. Lucas*, 462 U.S. 367, 390 (1983) (declining to extend Bivens' action to civil service employees, even while assuming that existing remedies do not provide complete relief for plaintiffs, "because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it"); *Schweiker v.*

by the Supreme Court and this circuit undermine Judge Ginsburg's argument that without resort to § 1983 and Bivens' suits, individuals like Crawford-El may not have redress. In *Schweiker*, for example, the Court acknowledged that "[t]he trauma to respondents, and thousands of others like them, must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens." *Schweiker*, 487 U.S. at 428-29. Nonetheless, the Court deferred to Congress' decision whether to leave a gap. Similarly, in *Spagnola*, this Circuit denied the appellants' argument that, because "no remedy whatsoever"existed for individuals aggrieved by minor personnel actions under the Civil Service Reform Act, the court was obliged to create a Bivens' remedy. This deference makes sense as a constitutional and practical matter; given their greater resources and access to information, legislators are more likely than district court judges to reach the most socially beneficial result.[16]

Chilicky, 487 U.S. 412, 429 (1988) (refusing to create a Bivens' remedy in light of an elaborate scheme devised by Congress and noting "[w]hether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex ... program"); *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (holding that "courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has "not inadvertently" *omitted damages remedies for certain claimants* and has not plainly expressed an intention that the courts preserve Bivens' remedies" (citation omitted) (emphasis added)).

[16] *See, e.g., Bush*, 462 U.S. at 389 ("Not only has Congress developed considerable familiarity with balancing

In any event, that there are real gaps is doubtful: by 1985 only 30 *Bivens* suits out of more than 12,000 resulted in a monetary judgment for the plaintiff at the trial level with only *four* judgments actually having been paid. *See* Written Statement of John J. Farley, III, Director, Torts Branch, Civil Division, U.S. Department of Justice, to the Litigation Section of the Bar of the District of Columbia (May 1985) at 1. Obviously, the vast majority of these suits are meritless. *See* Fallon, Meltzer & Shapiro, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1122 (4th ed. 1996) ("The view that constitutional tort actions are less likely to prove meritorious than civil litigation has been confirmed as to both prisoner and nonprisoner actions ..., although it is in the former class that the general lack of substance is most striking."). Prisoner suits serve less as a necessary deterrent to unconstitutional conduct (to put it mildly) than as a diversion from the monotony of prison life to plaintiffs such as Crawford-El, whose injury is the inconvenience of having some boxes being turned over to his brother-in-law. Perhaps all sides in this dispute would have been better off if the prison officials had agreed to provide an alternative form of entertainment to Crawford-El, maybe free

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governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts."); *United States v. Gilman*, 347 U.S. 507, 511-513 (1954) ("The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.").

cable, in return for not having to go through the expense and hassle of this lawsuit.[17]

* * * *

Although my reading of *Harlow* will reduce the costs to government officials—and the public—caused by *Bivens* actions and the impact of *Pape* on § 1983, much the better would be for Congress to legislate on the whole subject as it has on certain aspects of prisoner suits. The Supreme Court has recognized that when and if it does, the federal judiciary should beat a hasty retreat. *See Bush*, 462 U.S. at 368, 390.

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[17] Congress has already taken steps to limit prisoner suits. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 801 *et al.*, 110 Stat. 1321 (1996).

GINSBURG, *Circuit Judge*, concurring: I agree with the clear majority of my colleagues who conclude that the direct-evidence rule of *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1431 (D.C. Cir. 1987), should be abandoned. I also concur in Judge Williams' opinion insofar as it requires that a § 1983 or *Bivens* plaintiff who seeks damages from a government official for a constitutional tort must prove the defendant's unconstitutional motive (where that is an element of the tort) by clear and convincing evidence. As Judge Williams details, a plaintiff will feel the weight of this burden not only at trial but also in opposing a motion for summary judgment; in both contexts the plaintiff will have to present evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive.

I cannot concur, however, in Judge Williams' attempt to place an even greater burden upon the plaintiff at the summary judgment stage. He would require the district court to grant summary judgment prior to discovery unless the plaintiff already has in hand evidence of the defendant's motive that a reasonable jury could find "clear and convincing." That seems a rather bold intrusion into the district court's management of the fact-finding process, an area in which we generally defer to the trial judge. The consequences would be twofold. First, Judge Williams' proposal would put compensation beyond the reach of even the plaintiffs with the most meritorious claims—a consequence arguably consistent with *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), in which the Supreme Court accepted that some deserving plaintiffs would be denied compensation in order to reduce the social costs of litigation against government officials. Second, Judge Williams' approach would invite an increase in the number of constitutional torts that are committed—a consequence more difficult to square with *Harlow*.

I. General Principles

In relating this case to *Harlow*, we must consider not only the compensatory role of constitutional tort liability but also its deterrent purpose. The rule announced in *Harlow* probably did not increase the frequency with which public officials knowingly violate someone's constitutional rights. An official who knows that the action he is contemplating would violate an individual's constitutional rights can hardly be confident that a court will later disagree—more precisely, that the court will conclude that the official's action was objectively reasonable under the law as clearly established at the time. *Harlow* is cold comfort, *ex ante*, to that official. This is why the Court could say in *Harlow* that the rule announced there would "provide no license to lawless conduct." 457 U.S. at 819.

We cannot make the same statement about the requirement that the plaintiff prove his case by clear and convincing evidence; as sure as we are that demand curves slope downward and that there will be more of a behavior when the price (or penalty) goes down, we can be confident that raising the plaintiff's burden of persuasion will embolden some additional Government officials to take actions that they know are unconstitutional. Although we cannot know the magnitude of that effect (*i.e.* the slope of the demand curve for tortious conduct), I agree with Judge Williams that we are justified in taking this step to contain the social cost of litigating constitutional torts that turn upon the defendant's motive.

My colleague, however, would take not only this but a second step beyond *Harlow;* he would not only raise the plaintiff's burden of persuasion but also require the plaintiff to obtain evidence without the ability to compel its production from those most likely to have it. No matter whether the

plaintiff can demonstrate that he has a reasonable chance—or for that matter a virtual certainty—of obtaining such evidence from the defendant or even a third party, such as one of the defendant's coworkers, Judge Williams would deny him any discovery. This would further reduce the deterrent effect of constitutional tort liability, perhaps to a point below what is justified.

Judge Williams overlooks the point; Judge Silberman faces up to it but reminds us that "personal damage suits are decidedly not the only disincentive" to unconstitutional conduct. The federal statutes that he cites, however, do not justify the balance that he or Judge Williams would strike between the interests of injured plaintiffs and the public interest in avoiding unfounded litigation against government officials. First, those statutes do not reach all the motive-based constitutional torts for which a plaintiff can seek redress under *Bivens* or § 1983. Second, a plaintiff who seeks damages against a public official under any of the cited statutes has no greater access to discovery than does a plaintiff who sues for the same remedy under *Bivens* or § 1983; qualified immunity shields the public official from personal damage liability regardless of the particular type of action brought against him. *See Todd v. Hawk*, 72 F.3d 443, 445 n.7 (5th Cir. 1995) ("Racial discrimination claims brought under § 1981 are subject to the defense of qualified immunity"); *Hobson v. Wilson*, 737 F.2d 1, 19 (D.C. Cir. 1994) ("section 1985(3) encompasses actions against federal officers, subject, of course, to considerations of qualified immunity").

Effective deterrence of unconstitutional conduct depends unavoidably upon exposing public officials to some risks that might also chill them in the proper exercise of their discretion. In order to obtain any other remedy or impose any sanction, the plaintiff or prosecutor respectively will have to show that

some public official acted with a prohibited motive—racial, religious, or gender discrimination, retaliation for protected speech, or what have you. Although the public official will be shielded from personal liability and, perhaps, from the cost of retaining counsel, he will not be shielded from the demands upon his time, the risk of injury to his reputation, the emotional distress likely to attend an adversarial inquiry into whether his actions were basely motivated, or the possibility of unpleasant consequences apart from the litigation (such as losing his job) if the inquiry shows that his actions were improperly motivated. Therefore, that a particular rule, such as the one Judge Silberman proposes, would leave in place some deterrent effect because some types of cases might still be brought tells us little about whether the rule strikes an appropriate balance between our interest in deterring constitutional torts generally and our interest in reducing the social costs of litigation against public officials. Judge Silberman suggests, based upon the low success-rate of *Bivens* and § 1983 actions, that there is not much out there to deter. He does not consider, however, that the low-success rate is, in part, a result of the qualified immunity doctrine and other legal rules. We cannot know how much additional unconstitutional mischief the rules proposed by Judges Silberman and Williams would elicit, but that seems reason enough to proceed with more caution than either of them displays. A more prudent and discriminating approach—one that may preserve the desired deterrent while still lessening the burden now placed upon defendant public officials—would be to provide more guidance than we have heretofore given to district judges faced with the task of balancing, case by case, the competing values accommodated by the institution of qualified immunity. We could then rely upon them, as we normally do, to manage the fact-finding process that my colleagues would truncate with clear but Draconian rules.

When a defendant files a motion for summary judgment and the plaintiff argues that he needs discovery in order to withstand the motion, Rule 56(f) invests the district court with discretion to (1) deny the motion for summary judgment, (2) continue the motion pending discovery, or (3) "make such other order as is just." In a case involving qualified immunity, the district court abuses this discretion if it fails duly to consider not only the competing interests of the parties—as in any civil litigation—but also the social costs associated with discovery had against a government official.

Hence, while this court has acknowledged that "in the mine-run of cases" summary judgment is generally inappropriate until all discovery has been completed, *Martin*, 812 F.2d at 1436, we have also recognized that "creditable pleas of official immunity remove cases from the mine-run category," *id.* at 1436-37. Although we now reject then-Judge Ruth Bader Ginsburg's elevation of direct over circumstantial evidence, *see id.* at 1435, we ought not forget her description of our task in a case such as this—to "leav[e] some space for discovery" while "minimiz[ing] the burdens imposed upon government officials." *Id.* at 1437.

In *Martin* we required the plaintiff to make factual allegations sufficiently precise to enable the district court to "employ with particular care and sensibility [its] large authority to exercise control over discovery." *Id.* at 1437. We expected that district courts would protect government officials from "unnecessary involvement in [ ] litigation" by "permit[ting] particularized interrogation of the defendants for the circumscribed purpose of ascertaining whether there is any substance" to the plaintiff's specific factual allegations. *Id.* at 1438.

Rather than looking further back, as Chief Judge Edwards does, to the concern expressed in *Hobson*, 737 F.2d at 30-31,

that "in some circumstances plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage," we should go forward along the path to which Justice Ginsburg pointed us in *Martin*. Consideration of the social costs associated with litigation against public officials (which, as *Harlow* teaches, weighs heavily against discovery) should constrain to this extent the district court's discretion to continue a summary judgment motion pending discovery: If, when the defendant moves for summary judgment, the plaintiff cannot present evidence that would support a jury in finding that the defendant acted with an unconstitutional motive, then the district court should grant the motion for summary judgment unless the plaintiff can establish, based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest, a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive.

Chief Judge Edwards too speaks of requiring a "reasonable likelihood that additional discovery will uncover evidence to buttress the claim," but that is not the same as requiring a reasonable likelihood, based upon specific evidence within the plaintiff's command, that discovery will uncover evidence sufficient to sustain a jury finding in the plaintiff's favor. Moreover, the Chief Judge's emphasis upon some plaintiffs' ability to "paint only with a broad and speculative brush," and upon the district court's almost unfettered discretion (in the mine-run of cases, that is) to continue a summary judgment motion pending discovery, suggests a substantial difference in our expectations of the district court.

Permitting a plaintiff to pursue limited discovery only upon showing that he has a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive would leave more

space for discovery than would Judge Williams or Judge Silberman, would still protect the public from the costs of pointless discovery against Government officials, and would not usurp the district court's authority over the course of the litigation. Moreover, I see no reason to doubt the district court's willingness or ability to strike anew in each case the balance that underlies the doctrine of qualified immunity. Indeed, a district judge, whose experience with the management of discovery is far more extensive than ours, whose familiarity with the case and with the litigants is more immediate, and whose tools for controlling the course of litigation are more subtle and precise, is eminently qualified for this task.

II. Application to this Case

I agree with my colleagues who conclude that Crawford-El adequately alleged a violation of clearly established constitutional law and that we must therefore remand this case to the district court. But if on remand Britton moves for summary judgment prior to discovery and Crawford-El cannot substantially supplement the record now before us, then it would be an abuse of discretion for the district court to deny the motion or to continue it pending discovery.

A. The Summary Judgment Standard

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-56 (1986), the Supreme Court explained how a district court should determine whether a plaintiff has submitted evidence sufficient to withstand a summary judgment motion when the plaintiff must prove an element of his claim—in that libel case it was actual malice—by clear and convincing evidence:

> [T]here is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to

> allow a rational finder of fact to find actual malice by clear and convincing evidence.
>
> Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.... It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.
>
> Our holding that the clear-and- convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor....
>
> In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.... Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Thus, although the plaintiff is entitled to have all rational inferences drawn in his favor on intermediate facts—such as

hostility, in this case—those facts must add up to clear and convincing evidence of the ultimate facts that he must prove—here, that Britton (1) in order to retaliate against Crawford-El for exercising his constitutional rights (2) knowingly gave Crawford-El's legal papers to his brother-in-law.

B. Crawford-El's Complaint

Let us now look at Crawford-El's sworn declarations to see whether they are sufficient to withstand Britton's no doubt imminent motion for summary judgment. In paragraph 6 of his fourth amended complaint, Crawford-El declares that

> [1] Ms. Britton persistently displayed toward prisoners a cavalier attitude—manifesting a view that prisoners were beneath her, disentitled to dignity, and unworthy of civil treatment. [2] Ms. Britton was hostile to plaintiff, in particular, because she knew plaintiff ... had been in charge of the law library [and] had helped many prisoners prepare ... grievance forms or appeals of disciplinary actions, and had a reputation for asserting legal rights and knowing the administrative procedures for doing so. [3] Ms. Britton deemed plaintiff "too big for his britches."

The first sentence establishes merely that Britton did not like prisoners generally; it says nothing specific about her alleged unconstitutional motive. The second sentence states a fact about Britton's state of mind, to which Crawford-El may not testify without laying a foundation. *See* Fed.R.Civ.Pro. 56(e) ("affidavits shall be made on personal knowledge"); and Fed.R.Evid. 602 (accord) and 701 ("testimony in the form of opinions or inferences is limited to those opinions or inferences which are ... rationally based on the perception of the witness"). The third sentence, provided without context, does not tell us why Britton said that Crawford-El was "too

big for his britches" or even whether the statement manifests hostility.

In paragraph 9 of the complaint, Crawford-El declares that

> Ms. Britton was among those who were hostile to the Inmate Grievance Committee and to plaintiff's efforts to seek redress of prisoner grievances. On one occasion when plaintiff was typing [Housing and Adjustment] Board papers in the Q Block office, Ms. Britton came in and said to Cpt. (then Lt.) Brummell in a caustic manner that she (Cpt. Brummell) should watch out for plaintiff and make sure he wasn't using the typewriter to write up [grievance forms] or lawsuits. As Ms. Britton said this she stood over plaintiff to see what he was typing.

Britton's concern, even if caustically expressed, that Crawford-El not conduct his jailhouse law practice when he was supposed to be performing administrative work is not evidence of hostility to Crawford-El's efforts to seek redress of prisoner grievances.

In paragraph 12 of the complaint, Crawford-El declares that

> The day after the [first *Washington Post*] article was published [April 21, 1986], defendant Britton ordered plaintiff into her office. Corporal Barrett, then Officer in Charge of Dorm K2, escorted plaintiff there. Ms. Britton was visibly upset. After ignoring plaintiff for a considerable period, she asked him if he had arranged the visit by the reporter. When plaintiff said that he had, she asked him how he had done it. Plaintiff showed her the visitor application naming the reporters invited and their address and pointed out that Ms. Britton had approved the application. [7] Ms. Britton became enraged and accused

> plaintiff of tricking her. Plaintiff denied tricking her. [9] Ms. Britton said plaintiff had embarrassed her before her coworkers by having the reporter come. Ms. Britton made a telephone call trying to get plaintiff placed in restrictive confinement in Q Block. [11] When this effort failed she said that so long as plaintiff was incarcerated she was going to do everything she had to do to make it as hard for him as possible. A few days later Ms. Britton had plaintiff transferred to the Department's Central Facility.

Crawford-El's statement (in the 7th sentence) that Britton "became enraged" when she thought she had been duped by Crawford-El does not help his case. On the contrary, that she was angered at being tricked—Crawford-El has no constitutional right to trick his keeper—provides a qualifying context for Crawford-El's most significant declarations: that Britton said that she was embarrassed by the article and that she would make life hard for Crawford-El.

Judge Williams brushes the allegations aside as "self-serving." Self-serving opinions, inferences, and conclusions without a basis in perceptible fact may not be sufficient to withstand a summary judgment motion even under the mere preponderance standard; but neither is summary judgment "a procedure for resolving a swearing contest" over concrete facts, *see Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992) (Posner, J.) (§ 1983 action against prison officials), should such a contest arise—Britton has not contradicted Crawford-El's declaration with her own sworn statement. Recall *Anderson*, in which the Supreme Court instructed, again on a summary judgment motion in a case where the plaintiff must prove an element by clear and convincing evidence, that "[c]redibility determinations ... are jury functions, not those of a judge," and that "[t]he evidence of the non-movant is to be believed."

Suppose Britton (or Corporal Barrett) were to corroborate the alleged threat, however; without more it would not clearly and convincingly indicate that Britton's decision to deliver Crawford-El's property to his brother-in-law was unconstitutionally motivated. Britton allegedly made the threat in a moment of anger in April 1986; she delivered Crawford-El's property to his brother-in-law in September 1989, at the same time (according to Crawford-El's own declaration) that she was calling the families of other prisoners, who, like Crawford-El, were being sent to the federal prison in Petersburg, Virginia and threatening to discard the prisoner's property if a family member did not come to collect it.

In paragraph 15 of the complaint, Crawford-El declares that

> [During a transfer to the Spokane County Jail in Washington State] Correctional Officer Ballard, with Ms. Britton's knowledge, made a videotape of [ ] prisoners [including Crawford-El] while they were handcuffed, leg-shackled, and chained about their waists. Plaintiff and several others protested to Ms. Britton that the videotaping violated thir privacy rights. Plaintiff said to her that the videotaping could not be done without the prisoners' written authorization. Ms. Britton responded, "You're a prisoner, you don't have any rights."

What does this show? That Britton was generally insensitive to the constitutional rights of prisoners? Maybe. More likely it shows simply that she did not believe that a prisoner has a right not to be videotaped. In either event, it is not very probative on the question whether (nine months later) she retaliated against Crawford-El for exercising his first amendment rights.

In paragraph 17 of his complaint, Crawford-El alleges that shortly after publication of a second *Washington Post* article (December 1988) in which he was quoted on the topic of jailhouse lawyers, Britton told one Captain Manning of the Spokane County Jail (to which Crawford-El had been transferred) that Crawford-El was a "legal troublemaker." As Judge Williams observes, Britton's describing Crawford-El as a "legal troublemaker" is scant evidence of hostility. Indeed, viewed as an expression of hostility it is too mild to support the inference that she bore a grudge against Crawford-El nine months later when she gave his legal papers to his brother-in-law.

Finally, Crawford-El alleges that on August 18, 1989, when he and other prisoners told Britton that property left in her possession included important legal material, she "smirked and spoke in a cavalier manner," but "informed [Crawford-El] that she understood his need both for his personal property and his legal material and that she would personally see to it that [he] would get them." Crawford-El alleges also that upon arriving at the federal prison in Petersburg, Virginia several other D.C. prisoners informed him that Britton had asked their families to pick up their property or she would throw it away. Crawford-El offers no evidence indicating that Britton bore an unconstitutional animus toward any of these other prisoners; on the contrary, that she apparently treated the property of several prisoners in the same manner jibes with her sworn declaration that she was motivated by what she understood to be the policy of the Federal Bureau of Prisons.

In sum, even if Crawford-El were by discovery to get corroboration of every sworn declaration in his fourth amended complaint, he would not have evidence that would clearly and convincingly indicate to a reasonable jury what he must prove. At best, his evidence would establish that in a

moment of anger . April 1986, Britton threatened to retaliate against him for embarrassing her by making statements to a *Washington Post* reporter, and that as recently as December 1988 she resented his jailhouse lawyering. Crawford-El points to no evidence that Britton did anything to make good on the 1986 threat before she delivered his legal papers to his brother-in-law in September 1989, nor to anything suggesting that he could discover evidence of such rabid hostility toward him that it would constitute clear-and-convincing circumstantial evidence that Britton was retaliating against Crawford-El by treating him as she treated other similarly situated prisoners.

Under the clear-and-convincing evidence standard, no reasonable jury could find on these facts that Britton acted with an unconstitutional motive in 1989 and Crawford-El has not offered a reason to believe that more evidence can be discovered. If on remand he has nothing more significant to offer, then the plaintiff should be denied discovery and the defendant's motion for summary judgment should be granted.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

It is high time that we scuttle the awkward direct/circumstantial evidence distinction and I fully endorse the clear and convincing standard the plurality adopts in its stead. I am at a loss to understand, however, why my colleagues chose this case to do so. Despite repeated opportunities to replead below, both pro se and through appointed counsel, the plaintiff has failed, as he has so many times before,[1] to allege facts demonstrating the deprivation of any constitutional right (clearly established or not).[2] In short, his constitutional claims are frivolous and the district court would have done well to dismiss the complaint *sua sponte* under the *in forma pauperis* statute, either before or after our first remand. *See* 28 U.S.C. § 1915(d) (authorizing district court to dismiss *in forma pauperis* suit "if satisfied that the action is frivolous or malicious"). Nevertheless, my

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[1] *See, e.g., Best v. District of Columbia*, No. 92-7196 (D.C. Cir. 1995) (summarily affirming district court's dismissal of claim of wrongful videotaping of prisoners); *Crawford-El v. Meese*, No. 88-8034 (D.C. Cir. 1990) (summarily affirming dismissal of challenge to prison diet); *Crawford-El v. District of Columbia Dep't of Corrections*, No. 91-2413 (D.D.C. 1992) (dismissing claim for damages resulting from snakebite allegedly caused by guards' negligence); *Crawford-El v. Barry*, No. 88-0715, (D.D.C. 1989) (*sua sponte* dismissing claims of wrongful deprivation of visitation privileges and of denial of prison religious classes); *Crawford-El v. Shapiro*, No 88-2339 (D.D.C. 1988) (dismissing malpractice claim).

[2] *See Siegert v. Gilley*, 500 U.S. 226, 233 (1991) (finding qualified immunity where plaintiff "failed not only to allege the violation of a constitutional right that was clearly established at the time of [the defendant's] actions, but also to establish the violation of any constitutional right at all").

colleagues choose yet again to ignore the hopeless infirmity of the plaintiff's claims and insist on maintaining life support. On remand, the district court will no doubt at long last lay the plaintiff 's meritless claims to rest. I would have pulled the plug long ago.

The gist of the plaintiff's retaliation claim is this: In September 1989 defendant Britton handed the plaintiff 's belongings over to his brother-in-law rather than sending them directly to his new penal home, intending thereby to wreak vengeance upon the plaintiff for speaking to the press in 1986 and 1988. This is absurd. The only allegation that even suggests a retaliatory motive is that more than three years earlier, on April 21, 1986, the day after the first article was published, Britton accused the plaintiff of tricking her into signing the reporter's visitor's pass and made a general threat that she would "do everything she had to to make it as hard for him as possible."[3] Whatever probative force the alleged threat might otherwise have is undercut by the length of time that elapsed before the "diversion" of the plaintiff 's property. The plaintiff 's own factual allegations, on the other hand, reveal an innocent, even beneficent, motive for Britton's handling of the plaintiff 's property. According to the fourth amended complaint, the plaintiff 's brother-in-law, who was employed at the Department of Corrections, "informed plaintiff that he had been called by Ms. Britton, that she had told him she was concerned about his legal material and other property, that she was afraid that the property might get lost

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[3] The complaint does contain several allegations which, if true, may indicate Britton's general hostility toward the plaintiff and growing impatience with his complaints and litigiousness. While such evidence might support the plaintiff's now defunct claim of interference with his first amendment right to petition the court, it does not demonstrate intent to retaliate for the press interviews.

were she to send it from her office to the Lorton Property Officer for mailing to plaintiff." Appellant's App. 24-25. Thus, it appears Britton simply wanted to ensure that the property reached the plaintiff promptly and intact. And it would have had not the plaintiff himself prevented its delivery. In any event, intent aside, what Britton did had the effect of providing the plaintiff with exactly what he claims he wanted: prompt access to his property, if not in the precise manner he would have chosen (or at the taxpayer's expense). Thus, the complaint's claim of unconstitutional retaliation is "nonsensical on its face." *See Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994) (so characterizing inmate's complaint claiming unconstitutional reprisal by prison officials who, after he requested "protective custody," placed him in segregation, which, as the court noted, gave him "the protective custody he requested or its approximate equivalent").

Even assuming, against common sense, that Britton's handling of the plaintiff 's property amounted to some sort of punishment, he has no claim under 42 U.S.C. § 1983. As the panel noted in the plaintiff 's first appeal, there is a "general principle that some showing of injury is a prerequisite to a constitutional tort action." *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991) (citing *Butz v. Economou*, 438 U.S. 478, 504 (1978)) (*Crawford-El* I). In addition, the injury must be of constitutional dimension: "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). The plaintiff's retaliation claim is below the *de minimis* level. The only alleged injuries attributable to Britton are the costs of mailing three boxes of belongings to Florida—incurred when the plaintiff finally allowed his mother to send them—and, perhaps, a brief delay in receiving them and the consequent cost of temporarily replacing a few items, as well as the emotional distress

flowing therefrom.[4] Such slight harm does not cross the constitutional threshold. *Cf. Buthy v. Commissioner of Office of Mental Health*, 818 F.2d 1046, 1050 (2d Cir. 1987) (holding that state mental institution rule requiring forensic unit patients to remain awake for fixed 16-hour period is "a *de minimis* imposition on individual liberty" that cannot support due process claim); *Walsh v. Louisiana High Sch. Athletic Ass'n*, 616 F.2d 152, 158 (5th Cir. 1980) (rejecting student's challenge to "student transfer rule," making student attending high school outside his home district ineligible to participate in interscholastic athletics for one year, because of "the *de minimis* nature of the burden placed on the plaintiffs' free exercise of religion"). It is therefore redressable, if at all, through a local conversion suit, not in federal court under section 1983. *See Crawford-El* I, 951 F.2d at 1318 ("At worst, the act might constitute a common law conversion...."); *Paul v. Davis*, 424 U.S. 693, 699-701 (1976) (state law tort does not a constitutional deprivation make).

It is true that an ordinarily permissible act may become a constitutional deprivation if performed in retaliation for the exercise of a first amendment right. *See, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972) (decision not to renew untenured professor's contract); *Cornell v. Woods*, 69 F.3d 1383, 1387-88 (8th Cir.1995) (transfer of inmate to different prison); *Meriwether v. Coughlin*, 879 F.2d 1037 (2d Cir.1989) (change in inmate's work assignment); *Jackson v. Cain*, 864 F.2d 1235 (5th Cir. 1989) (filing disciplinary charges). The threshold injury requirement nevertheless remains. A retaliation claim is actionable precisely "because

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[4] Any other damages resulted not from Britton's decision but from the plaintiff's own intransigence. It is even doubtful that he would have suffered delay or replacement costs if he had allowed his mother to forward his belongings promptly.

retaliatory actions may tend to chill individuals' exercise of constitutional rights." *American Civil Liberties Union of Md., Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993) (citing *Perry v. Sindermann*, 408 U.S. at 597). Thus, the "test" for whether one exists "is whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech." *McGill v. Board of Educ.*, 602 F.2d 774, 780 (7th Cir. 1979) (citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)); *see also DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1994) ("Not every restriction is sufficient to chill the exercise of First Amendment rights, nor is every restriction actionable, even if retaliatory."); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) ("It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise."). The plaintiff's claim flunks the test. It is difficult to imagine that the minimal adverse effect (if any) of Britton's actions was likely to chill or deter him (or any reasonable person) from exercising his first amendment rights. Thus, even if retaliatory, Britton's conduct cannot give rise to a constitutional cause of action. *See DiMeglio v. Haines*, 45 F.3d at 806-07 (stating that claim of retaliatory reassignment of zoning investigator "to a geographic subset of the very region from which he formerly had derived his zoning assignments" "likely would not be sufficiently adverse to implicate the First Amendment"); *Raymon v. Alvord Indep. Sch. Dist.*, 639 F.2d 257 (5th Cir. March Unit A 1981) (holding that student's claim of retaliatory lowering of algebra grade, resulting in "insignificant decrease in her overall grade point average" that did not affect her class rank, was "patently insubstantial").

In sum, the plaintiff's meritless claims should have been long since booted and, in any event, should never have been

dignified with *en banc* review. Nevertheless, the issues have been joined and I concur in the plurality's disposition of them.

EDWARDS, *Chief Judge*, with whom WALD, RANDOLPH, ROGERS, and TATEL, *Circuit Judges*, concur, concurring in the judgment to remand: Justice Felix Frankfurter once wrote:

> [T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947). This admonition has been thoroughly lost on my colleagues who have a different view of this case. Without any directive from Congress or mandate from the Supreme Court, my colleagues run roughshod over the Federal Rules of Civil Procedure and invent new evidentiary standards that would make it all but certain that an entire category of constitutional tort claims against government officials—whether or not meritorious—would *never* be able to survive a defendant's assertion of qualified immunity. This result is both unfathomable and astonishing.

Fortunately, a clear majority of the court agrees that plaintiffs who file constitutional tort claims alleging that governmental officials acted with unconstitutional intent are not obligated to meet any form of heightened pleading standard in their initial complaint. Rather, it is clear that plaintiffs need only adhere to the basic notice pleading requirements of Federal Rule of Civil Procedure 8(c), and need not anticipate an affirmative defense of qualified immunity. Further, the opinions of the court make it clear that we reject any heightened pleading rule that would require plaintiffs to plead *direct*, rather than *circumstantial*, evidence.

However, I strongly disagree with Judge Williams's and Judge Henderson's opinions suggesting that, in the face of a defendant's claim for qualified immunity, a plaintiff faces dismissal (even without any discovery) unless he or she can put forward specific, nonconclusory factual allegations establishing the defendant's unconstitutional intent by *"clear and convincing" evidence*. I similarly reject Judge Silberman's opinion that would go even further and completely rewrite the law to say that a motive-based claim can never survive a motion to dismiss so long as the defendant's behavior can be seen as consistent with *any* possible legal motivation, *i.e.*, without regard to whether it can be demonstrated that the presumed legal motivation is not what actually prompted the actions that are at issue.

It is not surprising that these opinions (along with the separate opinion of Judge Ginsburg) can find no safe path to common ground. These opinions offer judgments that are in complete defiance of the Federal Rules of Civil Procedure, inventing evidentiary standards out of whole cloth and overlaying them onto the established procedures for adjudicating lawsuits in our federal courts. Because there is no principled basis for these judgments, the opinions flounder in their rationales and command no majority position.[1] There

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[1] Although all members of the court appear to agree that this case must be remanded for further proceedings, the court is sharply divided over the basis for remand. Judge Williams suggests that Judge Ginsburg's opinion (pursuant to which Crawford-El might get discovery) provides a "common denominator" of the reasoning of a majority, as the opinion consistent with the disposition on the narrowest grounds. Whether or not Judge Ginsburg's opinion controls, it is clear that a majority of the court agrees that the trial judge must have discretion to consider the appropriate circumstances under which discovery should be allowed.

are some telling similarities in the opinions, for each suffers from the same glaring infirmities: the opinions are completely unmoored to any legislative enactment or Supreme Court precedent, and they are contrary to the law of every other court of appeals in the nation. The net result is judicial activism at its most extreme. Because I believe that this court has no authority to amend the Federal Rules and to ignore established precedent, I reject the positions offered by my colleagues.

* * * *

A. This Circuit's Jurisprudence

The issue raised by this case is not a new one. Ever since the Supreme Court's opinion in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), holding that government officials generally can be held liable for civil damages only if they "violate clearly established statutory or constitutional rights," *id.* at 818, federal appeals courts have been forced to apply the principles of *Harlow* to cases in which plaintiffs allege that defendants took action against them with unconstitutional motivation. The difficulty with these cases is that, in some instances,

> plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent.

Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

In order to prevent frivolous claims from reaching such an advanced stage in the proceedings, the *Hobson* court required that these motive-based complaints provide "nonconclusory

allegations of evidence of such intent" in order to survive a motion to dismiss and proceed to discovery. *Id.* According to the court, "[t]he allegations on this issue need not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response." *Id.* Unlike the rule proposed by Judge Williams, this test did *not* create a new judge-made evidentiary standard, but was simply a "firm application of the Federal Rules of Civil Procedure," as called for by the Supreme Court in *Harlow*, 457 U.S. at 819-20 n.35 (internal quotation omitted). Moreover, in *Hobson*, we noted that, "in some circumstances plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage, and that overly rigid application of the rule ... could lead to dismissal of meritorious claims;" we therefore warned district court judges to act cautiously and dismiss only those claims that were "devoid of factual support." *Hobson*, 737 F.2d at 30-31.

In subsequent cases, this court, while purporting to remain faithful to *Hobson*, appeared to invent a new requirement, that plaintiffs plead only direct, as opposed to circumstantial, evidence of defendants' unconstitutional motivation. Given that the Supreme Court has stated that the probative value of circumstantial evidence "is intrinsically no different from testimonial evidence," *Holland v. United States*, 348 U.S. 121, 140 (1954), and that such evidence can in some cases be "more certain, satisfying and persuasive than direct evidence," *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960), the so-called direct-evidence rule never has made any sense. I therefore join my colleagues in emphatically rejecting such an illogical and unjustified requirement. I also agree with my colleagues that any evidentiary standard to be applied on a motion for summary judgment must be applied consistently at every subsequent stage of the proceedings before the trial court. Otherwise, as with the direct evidence

rule, plaintiffs would face a higher burden to survive a pre-trial motion than they would face in order to prevail at trial.

Having corrected our wrong turn towards a direct-evidence rule, we should not now reach out and invent yet another arbitrary and unjust standard. The correct decision in this case is to return to the sound principles set forth by the court in *Hobson*.

B. The ***Hobson*** Standard

Although this court has sometimes referred to the rule enunciated in *Hobson* as a "heightened pleading standard," *see, e.g., Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991); *Smith v. Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986), that label is misleading because application of the *Hobson* principles *does not* necessarily affect what the plaintiff must put in the complaint. Indeed, the Supreme Court made it clear in *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), that, as a matter of substantive law, "two—and only two—allegations are required in order to state a cause of action" under 42 U.S.C. § 1983 (1994). A plaintiff must allege only that the defendant "has deprived him of a federal right" and has "acted under color of state or territorial law." *Gomez*, 446 U.S. at 640. A defendant's qualified immunity is an affirmative defense, and, therefore, "the burden of pleading it rests with the defendant" under the Federal Rules, which provide that the defendant must plead any " "matter constituting an avoidance or affirmative defense.' " *Id.* (quoting FED. R. CIV. P. 8(c)). Thus, pursuant to *Gomez*, a plaintiff has no obligation to anticipate or respond to a potential qualified immunity defense in the initial complaint.

Once the defendant actually asserts the qualified immunity defense, however, the court must then determine whether the plaintiff can offer a sufficient factual basis to support the allegations of unconstitutional animus and therefore overcome qualified immunity. Under the Federal Rules, there are a number of appropriate mechanisms available by which the plaintiff can provide this additional factual support. For example, pursuant to Rule 7(a),[2] the plaintiff may file a reply that sets out the plaintiff's evidence relevant to immunity and the material that the plaintiff claims is reasonably likely to lead to pertinent additional evidence. *See Schultea v. Wood*, 47 F.3d 1427, 1432-33 (5th Cir. 1995) (en banc). Alternatively, the plaintiff may file an amended complaint[3] or a more definite statement,[4] or the court can use its discretionary power over discovery under Rule 26(b) to limit initial discovery to a brief interrogatory concerning the plaintiff's evidence relevant to immunity.[5] In any of these scenarios, the trial court is able to

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[2] Federal Rule of Civil Procedure 7(a) states that "the court may order a reply to an answer or a third-party answer."

[3] Federal Rule of Civil Procedure 15(a) permits a party to amend its complaint at any time "by leave of court."

[4] Federal Rule of Civil Procedure 12(e) permits a Motion for More Definite Statement if a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."

[5] Federal Rule of Civil Procedure 26(b)(2)(iii) permits the court to alter the limits on discovery if the trial judge determines that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the

evaluate the nature of the plaintiff's allegations concerning unconstitutional intent, prior to ruling on a defense motion for summary judgment.

Thus, rather than refer to the *Hobson* test as a heightened pleading requirement, I agree with Judge Easterbrook that we should "speak instead of the minimum quantum of proof required to defeat the initial motion for summary judgment." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 502 U.S. 1121 (1992). Under the principles enunciated in *Hobson*, plaintiffs can survive an initial motion for summary judgment, prior to discovery, by providing "nonconclusory allegations of evidence" of the defendant's unconstitutional intent.

Hobson also rightly recognized that the courts should be cautious in applying this standard, lest meritorious claims be dismissed. For example, it will sometimes be the case that the relevant evidence is in the possession of the defendant and is therefore unavailable to the plaintiff without further discovery. Thus, if the plaintiff can show a reasonable likelihood that additional discovery will uncover evidence to buttress the claim, the trial judge may invoke Rule 56(f) and deny the summary judgment motion.[6]

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litigation, and the importance of the proposed discovery in resolving the issues."

[6] Federal Rule of Civil Procedure 56(f) expressly grants the trial judge broad discretion to order discovery prior to ruling on a summary judgment motion, where the party opposing the motion cannot "present by affidavit facts essential to justify the party's opposition." This court has explicitly held that the decision whether or not to stay discovery pursuant to Rule 56(f) is committed to the sound discretion of the District Court. *White v. Fraternal Order of Police*, 909 F.2d 512,

These procedures are part of the standard apparatus provided by the Federal Rules to enable trial judges in civil suits to differentiate meritorious claims from frivolous ones, and the Supreme Court has *never* suggested that this same apparatus is somehow inadequate when it comes to the particular immunity concerns expressed in *Harlow*. Indeed, as Justice Kennedy has pointed out, the objective standard for qualified immunity articulated in *Harlow* was based on the fact that the standards for summary judgment at the time "made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent." *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring). Now, however, "subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). As a result, Rule 56 is now more than adequate to dispose of unmeritorious claims without appellate judges taking it upon themselves to invent new evidentiary standards designed to address particular categories of cases.

C. The Proposed Standard

Judge Williams's opinion argues that its Draconian rule requiring "clear and convincing" evidence is necessary to vindicate the *substantive right* of qualified immunity. I am inclined to agree with the view of the Seventh Circuit that "it

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517 (D.C. Cir. 1990). Yet, the new evidentiary standard proposed by Judge Williams would effectively strip the trial judge of this discretion, by denying *any* discovery to plaintiffs unless they can provide "clear and convincing" evidence prior to discovery.

is hard to depict a "right not to be tried' " as a substantive, rather than procedural, right. *Elliott*, 937 F.2d at 345. However, even were I to assume that qualified immunity is a substantive right, there is no valid justification for requiring plaintiffs to satisfy a "clear and convincing" evidence test in the cases here at issue. Indeed, there is great irony in the judgment offered by those judges who subscribe to Judge Williams's opinion, for the new rule that they propose would have a devastating impact on potential plaintiffs who already face substantial burdens in attempting to pursue civil rights claims. Recognizing these burdens, Chief Judge Posner has argued that there is a "peculiar perversity" in imposing a heightened standard in cases involving prison inmates because "it is far more difficult for a prisoner to write a detailed complaint than for a free person to do so" due to the fact that prisoners have no power to investigate their claims and gather evidence prior to obtaining discovery. *Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 789-90 (7th Cir. 1995); *see also* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 647 (1989) (The author argues that, in a case where the motive underlying a defendant's actions is a fact solely within the knowledge of the defendant, a court could not fairly grant defendant's motion for summary judgment before plaintiff has been given an opportunity to conduct discovery on this issue.). Thus, with regard to such cases, the standard proposed by Judge Williams, while purporting to permit some intent-based qualified immunity claims, would, as a practical matter, make it virtually impossible for these claims ever to survive a motion to dismiss. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 63 (1989) ("Where the plaintiff must establish the culpability element as part of the constitutional claim, denial of discovery on this issue would make it impossible to prove certain cases.").

In reading the opinions by Judge Williams and Judge Henderson, one is left with the impression that a "clear and convincing" standard is deemed necessary because, without it, some plaintiffs in section 1983 cases might actually prevail on their claims. Yet, it is overwhelmingly clear that the Court in *Harlow* never for a moment intended to insulate government officials from liability in all cases where the official's state of mind is a necessary element of the constitutional violation alleged. In fact, in *Harlow* itself the plaintiff alleged that the defendants had violated his First Amendment rights by dismissing him in retaliation for testifying before a congressional committee. As then-Judge Ruth Bader Ginsburg has pointed out,

> [h]ad the Court intended its formulation of the qualified immunity defense to foreclose *all* inquiry into the defendants' state of mind, the Court might have instructed the entry of judgment for defendants ... on the constitutional claim without further ado. In fact, the Court returned the case to the district court in an open-ended remand, a disposition hardly consistent with a firm intent to delete the state of mind inquiry from every constitutional tort calculus.

Martin v. District of Columbia Metro. Police Dep't, 812 F.2d 1425, 1432 (D.C. Cir.), *vacated in part*, 817 F.2d 144 (D.C. Cir.), *reinstated*, 824 F.2d 1240 (D.C. Cir. 1987).

Moreover, if a "clear and convincing" evidence standard were truly necessary to vindicate defendants' alleged substantive right not to be tried, as some of my colleagues seem to believe, one wonders why no other circuit has seen fit to embrace such a rule. Indeed, although nearly every other federal appeals court in the nation has addressed the precise issue that we face today, *not one* has adopted a standard even approaching the positions offered by my colleagues who view

this case differently. Instead, all ten circuits that have addressed the issue have adopted formulations that are essentially identical to the one laid out in *Hobson* and echoed in Justice Kennedy's concurrence in *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring) ("Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal.").[7]

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[7] Although some of the circuit courts have actually adopted some form of so-called "heightened pleading" requirement and have chosen to test the plaintiff's claims at the complaint stage (an approach that I believe runs counter to *Gomez*), the more important point is that, regardless of when they apply the test, the courts have been quite consistent in articulating the appropriate evidentiary burden. *See Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995) ("[T]he plaintiff must proffer particularized evidence of direct or circumstantial facts ... supporting the claim of an improper motive in order to avoid summary judgment."); *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988) ("The dual policy concerns of protecting state officials from a deluge of frivolous claims and providing state officials with sufficient notice of the claims asserted to enable preparation of responsive pleadings have led us to impose on section 1983 claims the additional pleading requirement that the complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs." (internal quotation omitted)), *cert. denied*, 489 U.S. 1065 (1989); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc) ("To avoid evisceration of the purposes of qualified immunity ... plaintiffs alleging unlawful intent ... [must] plead specific facts in a nonconclusory fashion to survive a motion to dismiss."); *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc) ("The district court need not allow any discovery unless it finds that plaintiff has

supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts."); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995) (Plaintiff must respond to an assertion of qualified immunity with "specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity."); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991) ("[T]he plaintiff [is required] to produce specific, nonconclusory factual allegations which establish the necessary mental state, or face dismissal." (internal quotation and alteration omitted)), *cert. denied*, 502 U.S. 1121 (1992); *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995) ("Complaints seeking damages against governmental officials ... are subject to a heightened standard of pleading with sufficient specificity to put defendants on notice of the nature of the claim."); *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991) ("We believe a requirement that a plaintiff must put forward nonconclusory allegations of subjective motivation ... satisfies *Harlow*'s directive that government officials should be shielded from "insubstantial' lawsuits, while at the same time preserving the opportunity for plaintiffs to pursue meritorious claims."); *Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir. 1994) ("To survive a summary judgment motion, a plaintiff must point to specific evidence showing the official's actions were improperly motivated."); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) ("In pleading a section 1983 action, some factual detail is necessary."), *cert. denied*, 507 U.S. 987 (1993). The First Circuit has not adopted a particular formulation of the standard, but instead has made it clear that intent-based claims can be sufficient to overcome qualified immunity, *see Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 46 (1st Cir. 1988), and has indicated that motions for summary judgment

Further, we have been presented with no evidence to indicate that, under these formulations, government officials around the country are being subjected to intolerable litigation burdens from intent-based civil rights suits or that district court judges are routinely permitting frivolous claims to go forward.[8] Indeed, it is worth noting that neither the Solicitor General nor the government defendants themselves even advocated a "clear and convincing" evidence standard in their submissions to this court.[9]

A rule requiring plaintiffs to meet a higher evidentiary standard in qualified immunity cases has never been endorsed

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in qualified immunity cases will be handled under the Federal Rules just like any other case, *see Alexis v. McDonald's Restaurants of Mass.*, 67 F.3d 341, 348-49 n.7 (1st Cir. 1995). Thus, no other federal jurisdiction operates under a standard even approaching the harshness of the positions endorsed by the judges who view this case differently.

[8] To the contrary, at least one empirical study of constitutional tort litigation concludes that "the image of a civil rights litigation explosion is overstated and borders on myth." Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 643 (1987).

[9] Although the brief of J. Michael Quinlan and Loye W. Miller, Jr., as *amici curiae*, does suggest a "clear and convincing" standard as a possible alternative to the direct evidence rule, *amici* offer no legal precedent requiring or supporting such a standard, arguing instead that, as a policy matter, the proposed standard would be appropriate given "the venerable principle that government officials are presumed to act in good faith." Brief of J. Michael Quinlan and Loye W. Miller, Jr. as Amici Curiae at 25.

by the Supreme Court, and (contrary to the suggestion in Judge Williams's opinion) *Harlow* itself gives no indication that the Court contemplated such an onerous requirement. Indeed, Judge Williams's opinion completely ignores the fact that, although the Court in *Harlow* stated that "insubstantial suits against high public officials should not be allowed to proceed to trial," the decision relies on the "firm application of the Federal Rules of Civil Procedure" to achieve this objective. *Harlow*, 457 U.S. at 819-20 n.35 (internal quotations omitted). Thus, nothing in *Harlow* gives appellate courts free-reign to perform their own cost-benefit analysis or to select new evidentiary standards out of thin air.

Furthermore, the recent case of *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), broadly *repudiates* the use of heightened, judge-made standards to fulfill policy-related goals such as those advanced by the judges who view this case differently. Although *Leatherman* addressed only claims against municipalities, it is significant that the Court explicitly rejected the justifications for a heightened standard that had been offered by the defendants, and instead insisted that the Federal Rules remain the sole touchstone for determining the sufficiency of the plaintiff's case. As the Court stated, additional requirements can be imposed only "by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* at 168.

Finally, my colleagues' attempt to justify a clear and convincing evidence standard by reference to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is in vain. In that case, nothing less than the First Amendment's guarantee of freedom of the press was at stake, and the Court concluded that this vital interest, enshrined in the Bill of Rights, justified a heightened evidentiary burden. *See, e.g., id.*, at 270 ("[W]e consider this case against the background of a profound

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open...."). Given that there is no analogous *constitutional right* protecting public officials from lawsuits, this case cannot possibly qualify as a "cognate" area of law.

Despite the complete lack of judicial precedent or evidence that an alternative judicial remedy is either appropriate or necessary, the judges who view this case differently have reached out and attempted to devise new rules of law that would have devastating consequences in many civil rights lawsuits. Thus, at precisely the moment that we have finally dispensed with our absurd and anomalous direct-evidence rule, some members of the court would once again concoct an arbitrary and unfair evidentiary standard that diverges from the settled law of every other court in the land.

D. Application to This Case

Although it is far from clear whether the plaintiff in this case can prevail on the merits of his claims, his complaint is sufficient to survive motions to dismiss or for summary judgment. Prison inmate Leonard Rollon Crawford-El alleges that prison official Patricia Britton unconstitutionally retaliated against him for exercising his First Amendment rights by deliberately retaining and then misdelivering his personal items during a series of prison transfers. Far from simply appending a claim of unconstitutional motivation to an otherwise questionable claim, however, Crawford-El's complaint, as recounted by the District Court, includes several specific factual allegations:

— Crawford-El alleges that Britton treated him worse than other prisoners because she knew that when he had been in charge of the law library at the Central Facility, he had helped other prisoners prepare their Administrative Remedy

Procedure grievance forms or their appeals of disciplinary decisions. Crawford-El had "a reputation for asserting legal rights and knowing the administrative procedures for doing so," and that made Britton hostile towards him. (Fourth Amended Complaint, at ¶ 6.)

— On April 20, 1986, *The Washington Post* published a front-page article about jail overcrowding based on interviews with Crawford-El. The next day, Britton chastised Crawford-El for tricking her and for embarrassing her before her co-workers. She threatened to make life hard for him in jail any way she could. (Fourth Amended Complaint, at ¶ 12.)

— Britton stated on another occasion that prisoners like Crawford-El "don't have any rights." (Fourth Amended Complaint, at ¶ 15.)

— After the publication of a second *Washington Post* article, which reported inmates' suspicions that "they were handpicked for transfer [from the District of Columbia to the State of Washington] because they were "jailhouse lawyers'—troublemaking "writ-writers' who tied up the courts with occasionally successful lawsuits against the prison system" and quoted Crawford-El to that effect, Britton told another prison official that Crawford-El was a "legal troublemaker." (Fourth Amended Complaint, at WW 16-17.) *Crawford-El v. Britton*, 844 F. Supp. 795, 802-03 (D.D.C. 1994).

Based on these and other allegations, the trial judge concluded that a jury "might reasonably infer ... that Britton diverted and withheld Crawford-El's property out of an unconstitutional desire to retaliate against a "legal troublemaker.' " *Id.* at 803. Thus, an experienced member of our District Court found that, under the Federal Rules of Civil Procedure, there is a legitimate case to go to the *jury*. Yet,

under the evidentiary standard proposed by several of my colleagues, Crawford-El's allegations would not be sufficient even to proceed to *discovery*. Nothing in the Supreme Court's qualified immunity jurisprudence justifies such a result; indeed, it would appear that Crawford-El's complaint would survive a motion for summary judgment under the rules adopted by every other court of appeals in the nation.

CONCLUSION

Given the lack of any Supreme Court decision indicating that a "clear and convincing" standard can or should be invented by judges and overlaid onto the Federal Rules of Civil Procedure, the result proposed by the judges who view this case differently suggests an extraordinary use of judicial authority. One would have thought that the outcome they propose would be anathema to judges who advocate a philosophy of judicial restraint, particularly when the more prudent course is to insist on a firm application of the Federal Rules until such a time as the Supreme Court commands us to do otherwise, or an amendment is made either to the Federal Rules or to section 1983 itself. "[J]ust as masons building a cathedral should not supplant the architect, even though both are creating a work of art, a judge should not supplant the politician or administrator though all are seeking sound governance." Stephen F. Williams, *The Roots of Deference*, 100 YALE L.J. 1103, 1111 (1991); *see also, e.g.*, Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 821-22 (1990) ("decr[ying] the extraordinary expansion of judicial power in the latter half of this century," and observing that the one concept that most distinguishes those who advocate "judicial restraint" is "avoidance of judicial policy making").

The simple truth here is that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388

(1971), and its progeny (not to mention the Civil Rights Act of 1871), remain the law of the land and control the actions of this court. And, as Justice Kennedy recently pointed out, courts must be cautious about "devising limitations to a remedial statute, enacted by Congress, which "on its face does not provide for *any* immunities.' " *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). I therefore find it incredible that some members of this court seek to create new rules that would effectively render impossible all *Bivens*-type civil rights actions that turn on the intent of government officials. Until the Supreme Court finally resolves the question once and for all, it appears that this circuit might sit alone among all the federal courts of appeal in its approach to this issue.

Citizens of the United States who legitimately use the legal system to render representatives of their government accountable for unconstitutional action should not find the courthouse door in our nation's capital slammed shut. I hope that will not be the consequence of today's decision.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7203 **September Term, 1995**
89cv03076

Leonard Rollon Crawford-El,

APPELLANT

v.

Patricia Britton, and
The District of Columbia, **FILED AUG 28 1996**

APPELLEES

Appeal from the United States District Court
for the District of Columbia

Before: **EDWARDS**, Chief Judge, **WALD** AND **RANDOLPH**, Circuit Judges.

JUDGMENT

It is **ORDERED**, on the Court's own motion, that, for the reasons stated in the accompanying memorandum opinion, it is

ORDERED and ADJUDGED that the case is remanded to the District Court for further proceedings.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert F. Bonner

Deputy Clerk

MEMORANDUM

Although the *en banc* court has now disposed of the First Amendment retaliation claim brought against defendant Britton, *Crawford-El v. Britton*, No. 94-7203 (D.C. Cir. August 27, 1996) (en banc), we remand to the District Court for further consideration of defendants' motions to dismiss the claim against the District of Columbia and the common-law conversion claim.

Although the District Court originally dismissed the claims against the District, the District was named as a defendant in subsequent amended complaints, and the District never objected. *See Crawford-El v. Britton*, Civ. Action No. 89-3076, slip op. at 1 n.1 (D.D.C. Feb. 15, 1994), *reprinted in* App. 34. Moreover, the District has never disputed its joinder as a defendant in any proceedings before this court. Thus, we agree with the determination of the trial judge that the District of Columbia remains a party in this case.

Further, the claims against the District were not before the *en banc* court, which addressed only the issues of the proper pleading and evidentiary burdens in cases against government officials who assert qualified immunity. The District of Columbia is a municipality, and it is undisputed that "municipalities do not enjoy immunity from suit--either absolute or qualified--under § 1983." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507

U.S. 163, 166 (1993). Thus the decision of the *en banc* court does not dispose of the claim against the District.

The District Court dismissed the claims against the District, reasoning that, "[b]ecause Crawford-El has not shown that Britton committed any constitutional violations, the District cannot be held liable for her acts." *Crawford-El v. Britton*, 844 F. Supp. 795, 807 n.16 (D.D.C. 1994). However, this analysis incorrectly ties together the potential liability of Britton and the District. Contrary to the District Court's suggestion, the claim against the District does *not* rise or fall with the resolution of the claim against Britton. Because the District is not entitled to qualified immunity, the claim against the city must be analyzed under a different standard.

It is well-settled that, "When execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983." *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978). Moreover, the Supreme Court has made it clear that a federal court may not apply any form of heightened pleading standard in civil rights cases alleging municipal liability. *Leatherman*, 507 U.S. at 164. Thus, Crawford-El's claims against the District must be evaluated according to the usual standard used in ruling on defense motions to dismiss.

As a result, the fact that Crawford-El's claims against Britton herself do not survive the heightened evidentiary burden imposed by the *en banc* court does not determine whether or not his claim against the District can proceed. We therefore remand so that the District Court can decide if Crawford-El has alleged sufficient facts to survive a motion to dismiss on the question of whether a municipal policy or

custom caused a constitutional violation. The District Court then must determine whether or not to exercise jurisdiction over the pendent common-law conversion claim.

So ordered.

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7203 **September Term, 1995**
89cv03076

Leonard Rollon Crawford-El,

APPELLANT

v.

Patricia Britton, and
The District of Columbia,

FILED NOV 28 1995

APPELLEES

Appeal from the United States District Court
for the District of Columbia

Before: **EDWARDS**, Chief Judge, **WALD** and **RANDOLPH**, Circuit Judges.

JUDGMENT

This cause came to be heard from an order of the United States District Court for the District of Columbia, and was briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons stated in the accompanying memorandum it is

ORDERED and **ADJUDGED** that the District Court's order dismissing appellant's claims of denial of his First Amendment right to petition and his Fifth Amendment right to procedural due processs is affirmed. Review of his First Amendment retaliation claim is reserved for resolution by the *en banc* court. Jurisdiction over appellant's pendent common law claim for conversion depends upon the *en banc* court's ultimate judgment regarding the remaining federal claim.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Eva Brown

Deputy Clerk

MEMORANDUM

Appellant Leonard Rollon Crawford-El, a prison inmate, brings this action under 42 U.S.C. § 1983 (1988). Appellant claims that, in retaliation for his exercise of First Amendment rights, District of Columbia Department of Corrections official Patricia Britton withheld his property and diverted it outside government control, causing him economic loss as well as mental and emotional distress. Further, appellant alleges that, because his property contained legal materials relevant to several pending lawsuits, he was impeded in exercising his First Amendment right to petition the courts for redress of grievances. Finally appellant claims that he was denied his Fifth Amendment right to procedural due process and also asserts a common law claim for conversion.

The District Court dismissed the complaint. We affirm the dismissal of appellant's right to petition and procedural due process claims. His First Amendment retaliation claim,

however, is reserved for resolution by the *en banc* court. Supplemental jurisdiction over appellant's pendent common law claim depends upon the *en banc* court's ultimate judgment regarding the remaining federal claim.

I. BACKGROUND

A. *The Dispute*

Appellant Crawford-El is a District of Columbia prisoner who, along with several other inmates, was transferred out of the District's prison system in 1988 due to overcrowding, and then shuffled among facilities in four other states. On July 28, 1989, after having been assigned to a Washington state prison, appellant and other inmates were transferred to a federal correctional institution in Marianna, Florida, via correctional facilities in Missouri and Virginia. The inmates who were so transferred did not arrive at Marianna until September 22, 1989. At the beginning of the transfer process, the inmates were forced to surrender their property to prison officials for shipping. Crawford-El's property consisted of legal papers concerning pending federal civil and administrative actions, a photograph he believed necessary for a post-conviction motion in his criminal case, and some clothing and other miscellaneous personal articles.

Defendant Britton was the District of Columbia corrections official responsible for shipping Crawford-El's property to him during this transfer. Britton directed Washington state authorities to ship Crawford-El's property (and the property of all other prisoners who were similarly transferred) to her in Washington, D.C. She received his property in mid-September 1989. Instead of then shipping Crawford-El's boxes to him in Marianna, Britton asked Crawford-El's brother-in-law, Department of Corrections employee Jesse Carter, to retrieve the property, even though Crawford-El had

never authorized such a release. After Carter had claimed the property, Crawford-El requested that he return it to Britton so that it could be shipped to Marianna through prison channels. When Britton refused to accept a return of the property, Carter delivered it to Crawford-El's mother, who mailed the property to Crawford-El at his expense on January 24, 1990.

At first, Marianna officials would not permit Crawford-El to receive his boxes because they had been mailed to him outside of prison channels. Crawford-El was forced to submit an administrative complaint in order to retrieve the property. Not until February 1990 did he finally receive his property, about six months after he had surrendered it to prison officials in Washington state.

As a result of Britton's actions, Crawford-El alleges that he suffered mental distress and was obligated to incur the first-class mail delivery costs of shipping his property from the District of Columbia to Marianna, Florida, as well as the cost of replacing underwear, tennis shoes, soft shoes, and other items in his delayed packages. Crawford-El sued both Britton, in her individual capacity, and the District of Columbia Department of Corrections, seeking declaratory, injunctive, and monetary relief.

II. ANALYSIS

In addition to his First Amendment retaliation claim, which will be resolved in further proceedings before the *en banc* court, Crawford-El raised two other constitutional claims, both of which were properly dismissed by the District Court. First, Crawford-El asserts that, because Britton deprived him of his legal papers for a period of six months, she interfered with his First Amendment right to petition the courts for redress of his grievances. The facts supporting this claim,

however, are indistinguishable from Crawford-El's previous claim alleging denial of his Fifth Amendment right of access to courts, which was rejected by this court at an earlier stage of these proceedings. *See Crawford-El v. Britton*, 951 F.2d 1314 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 62 (1992). In the initial appeal, the panel ruled that Crawford-El could not sustain an access to courts claim unless he could show a specific litigation injury. *Id.* at 1321-22. In his amended complaint, Crawford-El has merely reasserted the same non-litigation injuries and recast his losing right of access claim as a First Amendment right to petition claim. Further, appellant asserts that to sustain this new claim he need not show litigation injury. We do not decide whether such First Amendment claims always require evidence of actual effect on pending litigation, however, because in this instance, the law of the case controls. Crawford-El has offered no evidence to supplement the allegations rejected by this court on the first appeal; therefore, the District Court properly dismissed this claim.

Crawford-El also raises a procedural due process claim, seeking an injunction that would prevent defendants from depriving inmates of their legal materials without providing a prompt informal hearing. The Supreme Court has ruled that, in order to determine whether any given administrative procedures are constitutionally sufficient, we must consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Inmates do have a strong interest in their possession of legal materials necessary to pursue pending or contemplated litigation. In these circumstances, however, a pre-deprivation hearing would have only minimal added benefit because inmates already have other means of redress available. As the trial judge noted, inmates can always alert the courts in which their cases are pending and seek an extension of time until the legal materials are returned. If necessary, they can also petition the court for an injunction to return the legal materials withheld by prison officials. Thus, there is very little added value to providing the pre-deprivation hearing requested. Given the District of Columbia's need for efficient and secure prison transfers, the balancing test favors defendants on this issue, and the trial court properly dismissed the claim.

Finally, Crawford-El raises a common law conversion claim, which the District Court dismissed because, once all the federal claims had been rejected, the court lacked jurisdiction over the pendent, non-federal claim. The vitality of this claim, therefore depends on the final resolution of appellant's First Amendment retaliation claim. If that claim is ultimately reinstated, the District Court would be able to assert supplemental jurisdiction over the conversion claim under 28 U.S.C. § 1367 (Supp. V 1993). The District Court could then determine whether this claim should survive a motion to dismiss on the merits.

III. CONCLUSION

We affirm the District Court's dismissal of appellant's claims that he was denied his First Amendment right to petition and that he was denied his Fifth Amendment right to procedural due process. His First Amendment retaliation claim is reserved for resolution by the *en banc* court. Based

on the ultimate decision regarding that claim, the District Court may be able to assert supplemental jurisdiction over appellant's pendent common law conversion claim.

APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7203 **September Term, 1995**
89cv03076

Leonard Rollon Crawford-El,

APPELLANT

v.

Patricia Britton, and
The District of Columbia, **FILED** NOV 28 1995

APPELLEES

Appeal from the United States District Court
for the District of Columbia

Before: **EDWARDS**, Chief Judge, **WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS,** and **TATEL**, Circuit Judges.

ORDER

If is Ordered, by the Court *in banc*, on its own motion, that the issue of a "heightened pleading standard" will be considered and decided by the court sitting *in banc*. Oral argument before the Court *in banc* will be heard at 10:00 a.m. on Wednesday, March 20, 1996.

The parties are directed to file thirty copies each of briefs and to do so in accord with the following schedule:

Appellant's Brief and Appendix	1-5-96
Appellees' Brief	2-6-96
Appellant's Reply Brief	2-20-96

The briefs shall be limited to responding to the following questions:

1. In cases where plaintiffs bring civil rights claims against Government officials who assert qualified immunity, may this circuit supplement the Federal Rules of Civil Procedure by requiring plaintiffs to satisfy a heightened pleading requirement in their complaint or face dismissal prior to discovery? If so, should it be done?

2. May this circuit require that plaintiffs who allege that Government officials acted with unconstitutional intent plead direct, as opposed to circumstantial evidence of that intent? If so, should it be done?

3. In claims of constitutional tort where the unlawfulness depends on the actor's unconstitutional motive and the defendant enjoys qualified immunity, should the court grant a defense motion for summary judgment, made before plaintiff has conducted discovery, if the plaintiff has failed to adduce evidence from which the fact finder could reasonably infer the illicit motive? *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982); *Elliott v. Thomas*, 937 F.2d 338, 345-46 (7th Cir. 1991)?

4. In claims of constitutional tort where the unlawfulness depends on the actor's unconstitutional motive and the defendant enjoys qualified immunity, are there any circumstances, apart from national security issues of the sort

at stake in *Halperin v. Kissinger*, 807 F.2d 180, 184-85 (D.C. Cir. 1986), where the court should grant a defense motion for summary judgment on a showing by the defendant such that a reasonable jury would necessarily conclude that the defendant's stated motivation "would have been reasonable"? *Id.* at 188; *see also id.* at 189 (summary judgment warranted where no reasonable jury could find that "it was objectively unreasonable for the defendants" to be acting for stated, innocent motives).

5. To the extent that the answers to question #2 and #4 are negative, are there any alternative devices which protect defendants with qualified immunity, in cases of constitutional tort depending on the defendant's motive or intent, from the costs of litigation?

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert F. Bonner

Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed AUG 31, 1994
Clerk, U.S. District Court
District of Columbia
[Entry Date 9/1/94]

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON and,	)	
DISTRICT OF COLUMBIA,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This case comes before this court on plaintiff's motion to reconsider the order entered February 15, 1994,[1] which dismissed his fourth amended complaint. Based upon the motion and a subsequently filed supplemental memorandum in support, defendants' opposition, and plaintiff's reply, this court will deny plaintiff's motion for reconsideration for the reasons stated below.

I.

[1] Crawford-El v. Britton, 844 F.Supp. 795 (D.D.C. 1994).

Plaintiff's first set of arguments seeks to support his claim of impermissible retaliation for his exercise of his First Amendment rights. In his motion to reconsider, plaintiff argues that in the District of Columbia, plaintiffs alleging unconstitutional motive need not make their case with direct--not merely circumstantial--evidence in order to meet the heightened pleading standard and survive a motion to dismiss. Plaintiff has since conceded in his reply brief that Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir. 1993), forecloses this argument. The Kimberlin court held that[2]

> a plaintiff who charges a government official with a constitutional deprivation where the outcome depends on the official's state of mind . . . is subject to this circuit's so-called 'heightened pleading' standard, requiring pleading of specific direct evidence of intent to defeat a motion to dismiss. . . . Thus, [plaintiff] Kimberlin was required to proffer direct evidence of unconstitutional motive on the part of the two defendants and was precluded from relying on mere circumstantial evidence.

The Court of Appeals for this Circuit has recently refused to reconsider Kimberlin,[3] but a petition for certiorari is now pending in the Supreme Court.[4]

Second, plaintiff argues that despite Kimberlin, he need not produce direct evidence to clear the heightened pleading standard because defendant Britton waived the direct

[2] Kimberlin, 6 F.3d at 793-94, 795 (emphasis in original).

[3] See Kimberlin v. Quinlan, 17 F.3d 1525 (D.C. Cir. 1994).

[4] A petition for certiorari was filed on June 22, 1994. See 63 U.S.L.W. 3009 (July 12, 1994).

evidence element of her qualified immunity defense. Although it is true that Britton may have failed to "raise the distinction" between the direct and circumstantial tests,[5] she did raise the qualified immunity defense,[6] and by doing so she invoked all the standards that govern qualified immunity in this Circuit, including the direct evidence rule. In any event, it is not clear that a defendant like Britton who invoked the qualified immunity defense could waive the direct evidence rule even if she wanted to do so, and plaintiff cites no case for that proposition.

Third, plaintiff argues that the appellate panel that previously reviewed this case expressly ruled that plaintiff has already provided direct evidence that satisfies this Circuit's heightened pleading standard.[7] Rightly or wrongly decided, that determination is now law of the case, plaintiff argues, and he states that he is entitled on remand to use that finding to support his argument that Britton retaliated against him for his exercise of his First Amendment rights.

Yet plaintiff reads too much into the appellate court's ruling. The appellate court did rule that plaintiff proffered direct evidence that Britton acted with unconstitutional motive with respect to his court access right, but it said nothing about the evidence that she acted with unconstitutional motive with respect to his First Amendment rights. The former is proved with evidence showing intent to deprive plaintiff of access to the courts, the latter with evidence showing intent to punish plaintiff for his

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[5] Kimberlin, 6 F.3d at 795 n.12.

[6] See Defs.' Motion to Dismiss at 14.

[7] See Crawford-El v. Britton, 951 F.2d 1314, 1319-21 (D.C. Cir. 1992). See also Kimberlin, 6 F.3d at 795 n.12.

outspokenness. In this case, different evidence supports the two allegations,[8] although some evidence can be used to support them both.[9]

Fourth, plaintiff argues that whether the appellate panel has ruled on the question or not, he has proffered evidence that shows that Britton acted with unconstitutional motive with respect to his First Amendment rights. Yet the supportive evidence that plaintiff cites is the same evidence this court considered and rejected in the February 15 order,[10] and plaintiff offers no fresh reason to revise that decision.

II.

Plaintiff's second argument on reconsideratoin seeks to support his claim that Britton's intentional and lengthy deprivation and subsequent diversion of his active legal papers violated his right to petition for redress, as guaranteed by the First Amendment. Plaintiff is correct that the February 15 order did not address this claim. The court did not understand his complaint to state a petition-for-redress claim distinct from his court access claim. Having reviewed plaintiff's clear statement of his claim in his motion for reconsideration, the court now rejects it.

Plaintiff's argument is that Britton's actions deprived him of his First Amendment right to petition for redress of grievances, and that such a deprivation is unconstitutional

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[8] Contrast Crawford-El, 844 F. Supp. at 802-03 (paragraphs 1 and 2) with Crawford-El, 951 F.2d at 1320.

[9] Compare Crawford-El, 844 F. Supp. at 803 (paragraphs 3, 4 and 5) with Crawford-El, 951 F.2d at 1319-20).

[10] See Crawford-El, 844 F. Supp. at 802-03.

unless her actions are narrowly tailored to serve a significant government interest and leave adequate alternative methods for the exercise of First Amendment rights. The problem is that although plaintiff's First Amendment rights may have been threatened, they were never actually violated. None of his cases were dismissed or otherwise harmed by the delay. See Crawford-El, 951 F.2d 1322. Although he may have suffered some peripheral harms--the cost of replacing some clothing packaged in the delayed boxes, the cost of shipping the boxes to himself, and the emotional distress he claims to have suffered--plaintiff's right to petition under the First Amendment has simply not been injured. The appellate panel in this case has suggested that even First Amendment claims are subject to a de minimus rule and that the evidence in this case does not rise to that standard. See Crawford-El, 951 F.2d at 1322. This court agrees.

Accordingly, it is hereby ORDERED that plaintiff's motion to reconsider this court's order of Febrary 15, 1994 is DENIED.

SO ORDERED.

Royce C. Lamberth
United States District Judge

DATE: 8-31-94

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed FEB 15, 1994
Clerk, U.S. District Court
District of Columbia
[Entry Date 2/16/94]

LEONARD ROLLON CRAWFORD-EL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
PATRICIA BRITTON and	)	(RCL)
DISTRICT OF COLUMBIA,[1]	)	
	)	
	)	

[1] Even though the District of Columbia was previously dismissed as a defendant, the District is now properly named as a defendant in this case.

After the District was dismissed as a defendant on May 10, 1990 (Order of May 10, 1990, at ¶ 2), plaintiff received court-appointed counsel and moved for leave to file a third amended complaint, which named the District as a defendant. In its opposition to this motion, the District did not raise a law of the case defense to its reinstatement as a defendant, nor did it answer Crawford-El's argument that Fed. R. Civ. Proc. 15(a) allows the court to reinstate the District as a defendant. Crawford-El's motion to file a third amended complaint was granted. (Order of September 30, 1991.)

Defendants.)

MEMORANDUM OPINION

This case comes before this court on defendants' motion to dismiss plaintiff's fourth amended complaint. Having considered defendants' motion and plaintiff's opposition, this court hereby dismisses plaintiff's fourth amended complaint.

I. Background

Plaintiff Leonard Rollon Crawford-El is a District of Columbia prisoner who was transferred out of the District's prisons in 1988 and shuffled from facility to facility due to overcrowding in the District's prison system. At the start of one of those facility-to-facility transfers--a two-month-long move from the McNeil Island Correctional Center in Steilcoom, Washington on July 28, 1989, to a federal

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Similarly, when Crawford-El again named the District as a defendant in his fourth amended complaint, the District failed to oppose it on law of the case grounds (or on any other grounds, for that matter). The court granted Crawford-El's unopposed motion for leave to file a fourth amended complaint on May 5, 1992.

Again, in its motion to dismiss Crawford-El's fourth amended complaint, the District still did not raise a law of the case defense.

All in all, the District has had three chances to protest its reinstatement as a defendant in this case. If the District ever possessed a law of the case defense to reinstatement as a defendant, by now the District has thrice waived it.

correctional institution in Marianna, Florida, on September 22, 1989, via correctional facilities in Cameron, Missouri; Lorton, Virginia; and Petersburg, Virginia--Crawford-El had to surrender his property to prison officials for shipping. His property consisted of his papers in federal pro se and in forma pauperis civil actions, papers recording facts relevant to contemplated federal actions for damages, and a photograph he believed necessary for a post-conviction motion in his criminal case, as well as some clothing and other articles. (Fourth Amended Complaint, at ¶ 44.)

The District of Columbia corrections official who was responsible for shipping Crawford-El's property to him during this transfer was defendant Patricia Britton. She directed Washington state authorities to ship his property (and the property of all other prisoners who were being similarly transferred) to her in Washington, D.C. (Pl.'s Opp'n to Motion to Dismiss, at 2.) She received his property in mid-September, 1993. (Defs.' Motion to Dismiss, at 5.) Yet instead of shipping his property to him in Marianna, Britton asked Crawford-El's brother-in-law, Department of Corrections employee Jesse Carter to pick up Crawford-El's property. (Crawford-El never authorized such a release.) Carter picked up the property, but a[t] Crawford-El's request, he attempted to return it to Britton so that it could be shipped to Crawford-El through prison channels. (Fourth Amended Complaint, at ¶ 29.) Britton refused to accept the property from Carter. Carter then delivered the property to Crawford-El's mother, who mailed it to Crawford-El at his request and at his expense on January 24, 1990. (Defs.' Motion to Dismiss, at 6; Pl.' Opp'n to Motion to Dismiss, at 7.)

At first, Marianna officials would not permit Crawford-El to receive his boxes because they had been mailed to him outside prison channels. (Pl.'s Opp'n to Motion to Dismiss, at 7.) Crawford-El had to submit an administrative complaint in

order to get his property back. In February 1990, he finally did receive his property, about six months after he had surrendered his property to prison officials in Washingotn state. (Pl.'s Op'n to Motion to Dismiss, at 8.)

As a result of defendants' actions, he alleges, he had to incur the first class mail delivery costs of shipping his property from the District of Columbia to Marianna, Florida; the cost of replacing underwear, tennis shoes, soft shoes, and other items in his delayed packages; and suffered mental distress. (Fourth Amended Complaint, at ¶ 45.) For these injuries, Crawford-El seeks declaratory, injunctive, and monetary relief.

In response, defendants have filed a motion to dismiss. The issue before this court now is whether to grant this dispositive motion.

II. Court of Appeals' Decision

The United States Court of Appeals for the District of Columbia has provided direct guidance for the resolution of this motion to dismiss. In this case's first phase of life, Britton filed a motion to dismiss plaintiff's complaint,[2] which alleged that Britton had intentionally interfered with Crawford-El's constitutional right of access to the courts. On December 21, 1990, this court denied that motion to dismiss. She appealed and won a reversal and a remand to this court for repleading.

[2] The complaint then at issue was plaintiff's second amended complaint. The newly amended complaint at issue in the present case is plaintiff's fourth.

See Crawford-El v. Britton, 951 F.2d 1314 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 62 (1992).[3]

The Court of Appeals held that Crawford-El's complaint did not satisfy the heightened pleading standard for damages suits against government officials alleged to have acted on unconstitutional motives. To survive the motion to dismiss, Crawford-El had to satisfy the heightened pleading standard by making "specific nonconclusory allegations showing that Britton knew his property contained legal materials relating to pending cases and that she diverted his property with the intention of interfering with his litigation." Crawford-El, 951 F.2d at 1319 (emphasis in original).[4] The complaint that the Court of Appeals reviewed met this heightened pleading standard. See Crawford-El, 951 F.2d at 1320.

However, because Crawford-El did not offer evidence of actual injury, the Court of Appeals held that his complaint did not withstand the motion to dismiss. Crawford-El alleged that

[3] The District of Columbia was not a party to the appeal, although the District of Columbia Department of Corrections was a co-defendant with Britton.

[4] The Court of Appeals did not expressly state that it was requiring Crawford-El to meet the heightened pleading standard with direct, as opposed to merely circumstantial, evidence. See Crawford-El, 951 F.2d at 1317, 1320. However, the Crawford-El court could not have intended to exempt Crawford-El uniquely from the heightened pleading standard rule. See Kimberlin v. Quinlan, 6 F.3d 789, 795 n.12 (1993). For the purposes of applying the heightened pleading standard to this case on remand, this court will assume that the heightened pleading standard's direct evidence requirement as stated most recently in Kimberlin applies to this case.

the delay in receiving his property disorganized his legal proceedings, prevented him from helping his attorneys because he did not have his records and notes, and delayed his filing of several small claims, but the Court of Appeals held that these were not sufficiently concrete injuries. His only concrete injury--his allegation that the delay caused the dismissal of one of his claims--was found not to flow from Britton's acts. The Court of Appeals held that his other claimed losses--the cost of clothing to replace what as in the delayed packages, the cost of shipping his property to Florida, and the emotional distress--were not caused by a deprivation of his right of access to the courts.

The Court of Appeals remanded this case for repleading, offering Crawford-El a second chance to state an injury to support his claim of denial of acess to the courts. Crawford-El, 951 F.2d at 1322.

The question now before this court is whether Crawford-El's fourth amended complaint, pled by very able court-appointed counsel, survives defendants' motion to dismiss. Specifically, this court must determine, first, whether on remand Crawford-El has supported his court access claim--the sole claim reviewed by the Court of Appeals--with a showing of injury; and second, whether the four new claims that Crawford-El has raised in this fourth amended complaint withstand defendants' motion to dismiss.

III. Constitutional Right of Court Access

In his fourth amended complaint, Crawford-El pleads again the three injuries he alleged in the complaint the Court of Appeals reviewed. He restates his two pecuniary injuries--the cost of shipping his packages to himself, and the cost of replacing some clothing--and elaborates upon a third injury of "mental distress" caused by "the stressful communications

with officials and family members, the deprivation of pictures of loved ones, worry that his property might permanently or indefinitely be withheld from him, worry that his pending legal proceedings would be prejudiced, and worry that his pursuit of the administrative complaint in FCI Marianna [to be allowed to receive the packages as mailed from his mother] would adversely affect his relationships with FCI Marianna staff." (Fourth Amended Complaint, at ¶ 45.)

The Court of Appeals has explicitly held that these three injuries do not flow from any deprivation of Crawford-El's court access right (see Crawford-El, 951 F.2d at 1322), and that they do not support a claim seeking relief "for an isolated episode of interference with [the] rght of access to . . . legal materials." Crawford-El, 951 F.2d at 1321.

Yet instead of alleging merely a single, isolated episode of a violation of the right to court access, Crawford-El's fourth amended complaint alleges that defendants systematically deprived him and prisoners like him of their of [sic] legal materials out of pervasive ignorance or indifference to court access rights. (Pl.s' Op'n to Motion to Dismiss, at 21.) He argues that an allegation of a failure of the entire system need not be supported by a showing of actual injury. The systemic failure itself is injury enough. See, e.g., Chandler v. Baird, 926 F.2d 1057, 1063 (11th Cir. 1991); Sowell v. Vose, 941 F.2d 32, 34 (1st Cir. 1991).

To avoid the usual requirement of demonstrating actual injury, Crawford-El must allege systemic deprivation, challenging, for example, "the basic adequacy of materials and legal assistance made available to all or subgroups of the prison population. . . .[or] conditions [that] obviously go to the heart of any meaningful access to libraries, counsel, or courts." Chandler, 926 F.2d at 1063. Deprivations "of a minor

and short-lived nature" that do not "implicate general policies" are not enough. Id. at 1063.

However, Crawford-El's allegations of injury simply do not show that defendants habitually frustrated prisoners' court access rights.[5] His strongest allegation of systemic injury

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[5] It is unclear whether Crawford-El's injury allegations must meet the ordinary pleading standard or the heightened pleading standard.

The Crawford-El court, on the threshold of discussing whether plaintiff had met the injury requirement, stated that "[w]hile our past decisions have mainly focused on the need for specifics bearing on the intent element of a constitutional damage action . . . [it is] clear that the policy behind the qualified immunity defense--concern over 'the social cost of distracting government officials with litigation'--requires that the complaint as a whole satisfy the heightened pleading standard." Crawford-El, 951 F.2d at 1321 (citations omitted). The court concluded that Crawford-El had not offered "adequately specified evidence" of injury. Id.

However, the authority of the Crawford-El opinion on the heightened pleading standard has been called into question by a case that applies the heightened pleading standard only to allegations of unconstitutional intent. See Kimberlin, 6 F.3d at 795 n.12.

Nevertheless, for the purposes of this case, this debate on the scope of the heightened pleading standard is academic. Crawford-El's allegations of systemic injury would be insufficient to support his court access claim whether this court applied the ordinary pleading standard or the heightened pleading standard. Not only does Crawford-El fail to show by direct evidence that he and prisoners like him were

states that defendants have a policy of seizing prisoner property during prisoner transfers without regard for whether such property contains active legal files,[6] pursuant to which he will soon suffer another lengthy separation from his legal materials when he is returned to federal custody upon termination of this case.[7]

Yet even this allegation does not implicate a general policy that deprives prisoners from access to the courts. Most prisoners were not separated from their materials (legal or otherwise) for very long; as Crawford-El concedes, other prisoners had received their property by August or September 1989, shortly after they arrived at Lorton and only one or two months after separation from their property in Washington state. (Fourth Amended Complaint, at ¶¶ 25, 26.)

Further, although Crawford-El was separated from his materials longer than most, even that separation proved to be a minor and short-lived impediment to court access. He does not allege that he was totally deprived of legal materials. Presumably, he was able to use prison legal libraries and other legal resources while he waited for his materials to be returned to him. Further, his ability to request extensions of time from the courts handling his cases prevented the separation from his legal documents from becoming a serious impediment to his access to the courts.

His weaker allegations of systemic injury are simply off the mark. In his opposition to the motion to dismiss, Crawford-El

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systemically injured by defendants' policy, he fails to show it even by circumstantial evidence.

[6] Fourth Amended Complaint, at ¶ 52.

[7] Pl.'s Opp'n to Motion to Dismiss, at 17-18 n.11.

cites several paragraphs of his fourth amended complaint ins support of a showing of systemic injury. Yet none of them shows that he or others like him were systemically denied accesss to the courts or to legal materials. For example, three of the cited allegations show Britton's disdain for Crawford-El and her cavalier attitude toward her duties, but they do not indicate that he or other prisoners were actually deprived of materials necessary for pursuing legal matters.[8] Similarly

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[8] These three allegations are as follows:

(1) On August 9, 1989, Crawford-El and other D.C. prisoners told Britton that their property, which she was responsible for shipping, included necessary materials on pending cases. Britton smirked and acted and spoke cavalierly, but said that she understood his concerns and promised to personally make sure that he received his property. (Fourth Amended Complaint, at ¶ 20.)

(2) In Petersburg, Virginia, other D.C. prisoners told Crawford-El that Britton had called teir relatives and told them that if they did not pick up their property, she would throw it away. (Fourth Amended Complaint, at ¶ 28.) When Carter later voiced Crawford-El's concerns to Britton, she told him that Crawford-El should be happy she did not throw his property in the trash. (Fourth Amended Complaint, at ¶ 31.)

(3) Also in Petersburg, Virginia, Crawford-El and another prisoner called Britton, tricked her into accepting the call by having a friend place the call, told her that a Bureau of Prisons official had told them that their property would be sent to their final destinations, and expressed concern about their property. He alleges that Britton said that she had no duty to do anything with their property. (Fourth Amended Complaint, at ¶ 30.)

unpersuasive is his allegation that during the transfer from Cameron, Missouri, to Lorton, Britton lost a separate parcel of Crawford-El's full of non-legal documents: his canteen items, a letter with pictures, and stamps. (Fourth Amended Complaint, at ¶¶ 21-23.) That loss did not deprive him of legal materials nor limit his access to the courts. Lastly, his final cited allegation seems more supportive of defendants' position than his.[9]

Because Crawford-El has alleged no actual injury, and because he has not satisfactorily alleged systemic injury, Crawford-El's court access claim must be dismissed.

IV. New Claims

In addition to repleading his court access claim, Crawford-El invokes several other causes of action. Crawford-El alleges the violation of his First Amendment rights and his substantive and procedural due process rights. He also claims that defendants violated District of Columbia law by diverting his property outside government control to an unauthorized person. Each of these claims are examined in turn.

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[9] This last cited allegation states that in September 1989, Crawford-El asked attorney Robert Hauhart for help in retrieving his property. On behalf of Crawford-El and other prisoners, Hauhart wrote letters to Assistant Corporation Counsel (later Acting Deputy Director of the D.C. Department of Corrections) Paul Quander and to Associate Director of the Department of Corrections Arthur Graves. Quander wrote back that "[w]e are . . . moving with deliberate speed to dispatch inmates' property, including the four (4) individuals cited in your correspondence, in compliance with" Bureau of Prison directives. (Fourth Amended Complaint, at ¶¶ 32-35.)

A. First Amendment Claim

Crawford-El had a history in prison of speaking to the press about poor prison conditions and of filing lawsuits against Britton and other prison officials and the government. He had communicated with newspaper reporters, filed informal requests for redress of grievances, aided other prisoners who were seeking redress, made persistent requests for the return of his property, and pursued litigation against Britton and other Department of Corrections employees or the District of Columbia. (Fourth Amended Complaint, at ¶¶ 41(a), 48.) Britton, he alleges, intentionally withheld and diverted his property during the transfers in order to retaliate for this "legal troublemaking," violating his First Amendment rights to freedom of speech and to petition for redress of grievances. As a result, he claims to have been forced to incur the cost of replacing clothing and shipping his boxes to himself, and to have suffered emotional distress.

In order to state a claim under the First Amendment, Crawford-El must establish first, that Britton's actions actually injured his exercise of his First Amendment rights, and second, that he has satisfied the heightened pleading standard. Crawford-El has satisfied the first requirement, but not the second.

1. Injury

As with his court access claim, the threshold determination of Crawford-El's First Amendment claim is whether he can show actual injury. In Crawford-El, the Court of Appeals suggested that plaintiffs claiming First Amendment injuries must do more than simply allege that state actors acted unconstitutionally. The Crawford-El court indicated that even in First Amendment cases, at least a de minimis showing of injury is required. See Crawford-El, 951 F.2d at 1322. The

court cited dicta in Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982), in which Judge Posner stated that "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." The Bart court hypothesized that if, for example, a state official had done noting more than frown at one of his employees in mild retaliation against the employee's determination to run for public office, the frown would not trigger a First Amendment claim. See Bart, 677 F.2d at 625. The court considered it "a question of fact" whether the challenged state actions rose to a First Amendment injury. Id.

Under this standard, Crawford-El must be able to show that Britton's retaliatory acts would chill or slence a "person of ordinary firmness" from future First Amendment activities. Crawford-El can make this showing. The pecuniary losss he sustained--the cost of shipping, and of replacing clothing--may be small, but they do amount to actual harm. Tis actual injury might well deter a person of ordinary firmness from speaking or petitioning again, for fear of incurring financial injury again. Because Crawford-El claims actual, financial injury, traceable directly to Britton's allegedly unconstitutional act, he has satisfied the injury requirement for his First Amendment claim.

2. Heightened Pleading Standard

Nevertheless, Crawford-El's First Amendment claim must be dismissed for failure to meet the heightened pleading standard. To survive a defense of qualified immunity, a claim of a constitutional violation by a government official whcih turns onthe official's motive must meetthe heightened pleading standard established in this Circuit. See, e.g., Siegert v. Gilley, 895 F.2d 797, 800-02 (D.C. Cir. 1990), aff'd on other grounds, 500 U.S. 226 (1991). The heightened pleading

standard requires plaintiffs to plead "specific direct evidence of intent." Kimberlin v. Quinlan, 6 F.3d 789, 793 (1993) (emphasis in original). Plaintiffs must point to direct, not merely circumstantial, evidence of government officials' unconstitutional motives. See Seigert, 895 F. 2d at 802.

For example, in Hobson v. Wilson, 737 F.2d 1 (D.C. 1984), cert. denied, 470 U.S. 1084 (1985), plaintiffs met the heightened pleading standard by citing memoranda written by defendants (the Federal Bureau of Investigation and District of Columbia law enforcement authorities) stating that defendants were motivated by the unconstitutional desire to frustrate plaintiffs' political activities. Hobson, 737 F.2d at 10, 27.

Yet without this kind of direct evidence of unconstitutional motive, plaintiffs cannot meet the heightened pleading standard. In Kimberlin, for example, a prisoner was unable to produce direct evidence that he was placed in administrative detention three times in order to deny him access to the press and to retaliate for his claim that he had sold marijuana to Dan Quayle, then a vice-presidential candidate. The prisoner's case was backed by circumstantial evidence: discrepancies among accounts of the circumstances before the first and second detentions, hints that the official excuse for the detentions was pretextual, high-level official direction of local detention decisions, comunication between the Bush-Quayle campaign and the defendants, and the prison's sudden decision to cancel a scheduled press conference. See Kimberlin, 6 F.3d at 801-03 (Edwards, J., dissenting). Such circumstantial evidence, suspicious as it may be, did not satisfy the heightened pleading standard. Accordingly, the Kimberlin court reversed the district judge's denial of the individual defendants' motion for dismissal or summary judgment on the First Amendment claims. See Kimberlin, 6 F.3d at 798.

As these examples show, direct evidence of unconstitutional intent is very hard to plead or produce, especially without the benefit of discovery. With the best evidence of unconstitutional motive often under defendants' control, plaintiffs are rarely in a position to plead or produce enough direct evidence to meet the heightened pleading standard. See Siegert, 500 U.S. at 246 (Marshall, J., dissenting). In fact, the heightened pleading standard appears to block all cases in which the defendants do not baldly state their unconstitutional motives, since even tremendous amounts of circumstantial evidence do not suffice. See Kimberlin, 6 F.3d at 798 (Williams, J., concurring).

Crawford-El's complaint cannot clear the high hurdle of the heightened pleading standard. His complaint lacks any direct evidence that when Britton withheld and diverted his property, she was motivated by an unconstitutional desire to punish him for speaking to the press, for pursuing litigation against her or other Department of Corrections employees or the District of Columbia, or for helping other inmates file grievances.

His allegations, listed below, are entirely circumstantial:

(1) Crawford-El alleges that Britton treated him worse than other prisoners because she knew that when he had been in charge of the law library at the Central Facility, he had helped other prsoners prepare their Administrative Remedy Prodedure grievance forms or their appeals of disciplinary decisions. Crawford-El had "a reputation for asserting legal rights and knowing the administrative procedures for doing so," and that made Britton hostile towards him. (Fourth Amended Complaint, at ¶ 6.)

(2) Crawford-El helped found an Inmate Grievance Committee to protest the lack of prisoner clothing and the

correctional staff's persistent inability [to] account for all prisoners in time for the prisoners' morning educational programs. Britton knew about Crawford-El's role in the Inmate Grievance Committee, and he alleges that it made her hostile towards him. When Crawford-El was typing in a correctional office as part of his clerical job, Britton caustically told the captain for whom he worked to make sure Crawford-El was not typing up lawsuits or grievance complaints. Britton then stood over him tosee wat he was typing. (Fourth Amended Complaint, at ¶¶ 7, 9.)

(3) On April 20, 1986, The Washington Post published a front-page article about jail overcrowding based on interviews with Crawford-El. The next day, Britton chastised Crawford-El for tricking her and for embarrassing her before her co-workers. She threatened to make life hard for him in jail any way she could. (Fourth Amended Complaint, at ¶ 12.)

(4) Britton stated on another occasion that prisoners like Crawford-El "don't have any rights." (Fourth Amended Complaint, at ¶ 15.)

(5) After the publication of a second The Washington Post article, which reported inmates' suspicions that "they were handpicked for transfer [from the District of Columbia to the State of Washington] because they were 'jailhouse lawyers'--troublemaking 'writ-writers' who tied up the courts with occasionally successful lawsuits against the prison system" and quoted Crawford-El to that effect, Britton told another prison official that Crawford-El was a "legal troublemaker." (Fourth Amended Complaint, at ¶¶ 16-17.)

None of these allegations offers direct evidence that Britton wasmotivated by a desire to punish Crawford-El for his exercise of his First amendment rights. At best, they show that Britton was hostile towards him generally and callous in

her regard for constitutional rights. A jury might reasonably infer from these allegations that Britton diverted and withheld Crawford-El's property out of an unconstitutional desire to retaliate against a "legal troublemaker." However, reasonable inferences do not satisfy the heightened pleading standard. See Kimberlin, 6 F.3d at 798 (Williams, J., concurring). The heightened pleading standard demands direct evidenced. All Crawford-El has pled in this case is circumstantial evidence--evidence that is weaker, incidentally, than the circumstantial evidence in Kimberlin.

Accordingly, defendants' motion to dismiss Crawford-El's First Amendment claim on qualified immunity grounds shall be granted for failure to meet the heightened pleading standard.

B. Procedural Due Process Claim

Crawford-El also alleges that Britton's acts violated his Fifth Amendment right to procedural due process. (Fourth Amended Complaint, at ¶¶ 49, 52.)

For this violation, Crawford-El seeks both damages[10] and an injunction instituting hearings before prisoners are separated from their property. His proposed injunction would prevent the District, its officers, agents, and employees (i) from depriving prisoners of their legal materials without affording them a prompt informal hearing at which they may inform a responsible official of their need to retain or quickly regain possesion of legal materials needed to pursue ongoing or contemplated legal proceedings, or (ii) from separating them from materials they reasonably deem necessary to

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[10] He asks that the District be held jointly and severally liable with Britton under § 1983 for her challenged acts. (Fourth Amended Complaint, at ¶ 52.)

pursue legal redress for periods they reasonably deem likely to be prejudicial to their cases. (Fourth Amended Complaint, at ¶¶ 53(c), 44(iii).)

Crawford-El's procedural due process claim challenges two separate actions of Britton: her withholding of his property, pursuant to District policy, during his transfer from Washington state to Florida; and her diversion of his property to hsi brother-in-law. Both halves of this procedural due process claim shall be dismissed. The second half merits dismissal under the Parratt doctrine. The first half must be dismissed because prisoners' interest in possessing property and the slight added value of a pre-deprivation hearing do not outweigh prison authorities' great and legitimate need to ensure safety and efficiency in prison transfers.

1. Diversion

The procedural due process claim's second half--Crawford-El's allegation that Britton diverted his property to his brother-in-law without authority--is easily dismissed. The facts of Britton's diversion are indistinguishable from the facts of Parratt v. Taylor, 451 U.S. 527 (1981), in which the Supreme Court held that where post-deprivation remedies are "the only remedies the State could be expected to provide," post-deprivation remedies are all that are constitutionally due. Zinermon v. Burch, 494 U.S. 113, 128 (1990) (restating rule of Parratt).[11] Under such circumstances, if the state (or in this

[11] Although Parratt involved the due process clause of the Fourteenth Amendment, its analysis is equally applicable to Crawford-El's due process claim under the Fifth Amendment.

Nor does Parratt's partial reversal render the Parratt rule inapplicable to this case. Parratt was partially overruled by Daniels v. Williams, 474 U.S. 327 (1986) and Davidson v.

case, the District of Columbia) has provided an adequate post-deprivation remedy for an alleged loss, there is no constitutional due process violation. See Parratt, 451 U.S. at 544.

In Parratt, as in this case, the government could not have provided prisoners any conceivable process before a prison official--acting randomly and without authorization--deprived a prisoner of his property. In Parratt, the Court ruled that because the state could not have anticipated the negligent loss by prison officials of a hobby kit that a prisoner had

Cannon, 474 U.S. 344 (1986), which held that merely negligent acts that cause unintended injury to property do not violate the due proces clause.

In this case, Crawford-El has not based his procedural due process claim on an allegation of mere negligence. He alleges that Britton withheld and diverted his property while "knowing, or with reckless disregard for and deliberate indifference [as] to whether" his property included legal materials in pending or contemplated cases. (Fourth Amended Complaint, ¶ 49.)

The Supreme Court has considered governmental action taken with willful, wanton and reckless disregard for and indifference to constitutional rights to be sufficient to state a procedural due process claim. Zinermon, 494 U.S. at 121. Although the Zinermon court did not address the state-of-mind issue squarely , the Court did hold that the "complaint was sufficient to state a claim under § 1983 for violation of his procedural due process rights." Zinermon, 494 U.S. at 139. See also id. at 143 (O"Connor, J., dissenting) (allegations that rights were violated "deliberately or recklessly" are sufficient).

ordered by mail, adequate post-deprivation remedies sufficed. See Hudson, 468 U.S. at 533.

This case is not materially different from Parratt or Hudson. Here, the District could not have anticipated Britton's wacky decision to divert Crawford-El's property to his brother-in-law without authorization. It is hard to imagine that it is District policy to mail prisoner property to family members instead of to the prisoners themselves, without prisoner consent. (According to defendants, Britton diverted Crawford-El's property to his brother-in-law because she misunderstood the Federal Bureau of Prisoner's policy about shipments of prisoner property. She apparently believed that the federal correctional institution in Marianna, Florida, would not accept prisoner property shipped by District officials. (Defs.' Motion to Dismiss, at 5 & n.3.)) Assuming that it is not District policy to force family members to retrieve prisoner property, Britton's action was unauthorized, unpredictable, and random (although not unique, since she is alleged to have done the sme thing with other prisoners' property). Because of that, there is no conceivable way that the District could fashion a hearing to prevent her from doing what she did.

When the District cannot reasonably anticipate due process violations, post-deprivation remedies--such as recourse to an adequate local law claim--are sufficient. In this case, an entirely adequate District of Columbia post-deprivation procedure was available to Crawford-El for the recovery of his loss. He could have brought an action for damages in the District of Columbia courts alleging that the city or it officers did negligent or intentional harm to his property.[12] The

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[12] See, e.g., Ali v. Barry, 550 A.2d 1130, 1131 n.3 (D.C. App. 1988) (District officials liable for intentional damage to property when committed within scope of employment); Scott

pleadings in this case do not reflect that he brought such an action in the District of Columbia courts.

Because the District of Columbia courts afforded him an adequate proceeding in which he could have recovered his loss, and because Britton's random and unauthorized diversion of his property could not have been prevented with a pre-deprivation hearing, this half of Crawford-El's procedural due process claim shall be dismissed.

2. Withholding

The other half of Crawford-El's procedural due process claim challenges the District's practice of withholding prisoners' possessions--including their legal materials--for lengthy perods of time during prisoner transfers. This half of the claim shall also be dismissed, but for a different reason.

Parratt does not dispose of this withholding claim as it disposed of the diversion claim. Instead of challenging one random and unauthorized act, Crawford-El's withholding claim alleges a general failure to provide procedural safeguards to prevent foreseeable, avoidable harms authorized by the District. Crawford-El alleges (and the District does not dispute) that when he was transferred, there was a foreseeable risk that he would be separated from his legal materials while one of his cases was pending or contemplated. He also alleges that this risk could have been avoided by a pre-deprivation hearing, and that when Britton withheld his property, she was

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v. District of Columbia, 493 A. 2d 319, 322 (D.C. App. 1985) (District liable for its employees' intentional torts when committed within scope of employment). See also 24 D.C.C. § 442 ("Department of Corrections . . . shall . . . be responsible for the safekeeping, care, protection, instruction and discipline of all persons comitted to such institutions.").

exercising power delegated to her from the District to do so.[13] In such a case, the mere existence of adequate post-deprivation remedies is not sufficient to dimiss the claim. See Zinermon, 494 U.S. at 136, 136-38 (permitting procedural due process claim to go forward, despite existence of adequate state remedies, where deprivation was aleged to have been predictable, avoidable through pre-deprivation procedures, and authorized).

Since the withholding claim cannot be easily dismissed under Parratt, the task bcomes determining whether any process is due, and how much. procedural due process "is a flexible concept that varies with the particular situation." Zinermon, 113 U.S. at 127. The particularized inquiry of determining how much process is due in a given situation is governed by three factors:

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[13] According to Crawford-El's unchallenged allegations, Britton's withholding of his property during his transfer occurred because of "the District of Columbia's alleged custom, policy and practice of seizing active legal files for indefinite periods." (Pl.'s Opp'n to Motion to Dismiss, at 20.) "At no time during this litigation has anyone suggested that Ms. Britton's mass seizure of prisoner property was unusual or in any way in violation of District policy." (Pl.'s Opp'n to Motion to Dismiss, at 15, n.8.) Crawford-El expects that his "discovery requests will show that the District of Columbia routinely deprives prisoners of their property, including legal papers, for substantial periods of time, incident to movement to distant facilities, or from one District facility to another, and even from cell to cell." (Pl.'s Opp'n to Motion to Dismiss, at 15 n.8.) He asserts that "[u]nder current District policy, Mr. Crawford-El has no right to retain possession of active legal files during travel to his final federal destination." (Pl.'s Opp'n to Motion to Dismiss, at 17 n.11.)

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and adminsitrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). A weighing of the three factors in this case shows that the District's interest in securing a safe and efficient system of prisoner transfers far outweighs prisoners' interest in possesing their property, given the very slight added value that a pre-deprivation hearing would provide.

Prisoners like Crawford-El, of course, have an interest in their possession, and in some possessions they have a stronger interest thatn others. They have an especially hight interest in their legal materals that are necessary to pursue pending or contemplated litigation. To deprive prisoners of legal materials entirely might frustrate their ability to pursue litigation, jeopardizing their constitutional right to court access. It would be just as unconstitutional as unjustifiedly requiring Jewish inmates to surrender every yarmulke or other head covering during transfers, frustrating the "First Amendment right to fulfill one of the traditional obligations of a male Orthodox Jew--to cover his head before an omnipresent God."[14] By contrast, prisoners have a much lesser interest in their possession that have nothing to do with the exercise of constitutional rights. Crawford-El may have a strong interest in possessing his legal materials, but he has a

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[14] Goldman v. Weinberger, 475 U.S. 503, 513 (1986) (Brennan, J., dissenting).

far weaker interest in possessing the underwear and tennis shoes that were packaged in his shipped boxes.

The second prong of the Mathews analysis requires examining the degree to which a pre-withholding hearing would prevent wrongful deprivations of prisoner property. A pre-withhlding hearing would not add much to the redress already availabl to prisoners like Crawford-El. He is already free to alert the courts for an extension of time until the legal materials were returned, or if necessary, he can move for an injunction ordering the District to return necessary legal materials. Such measures minimize, if not eradicate, any risk that his court access rights would actually be injured when the District withholds his legal materials.

Thirdly, the Mathews analysis requires weighing the District's need for efficiency and security in prisoner transfers. The District has a great interest in ensuring safe and efficient prisoner transfers by transferring prisoners's property separately form the prisoners themselves.

In sum, the Constitution does not require burdening the Distict with expensive pre-withholding hearings which would not add much to the relief prisoners already have available. Crawford-El's strong interest in possessing his legal materials is already sufficiently safeguarded by his ability to appeal to the courts handling his jeopardized cases; his negligible interest in his sneakers deserves no additional procedural safeguards.

Because the District's interests outweigh the prisoners' interest and the risk of error in this Mathews balancing test, no pre-deprivation hearing is constitutionally required before the District withholds property from prisoners. because the District's failure to provide such a pre-withholding hearing dies not amount to a constitutional violation, this half of

Crawford-El's procedural due process claim shall be dismissed.

C. Substantive Due Process Claim

Crawford-El also alleges that Britton's withholding and diversion of his property violated his Fifth Amendment substantive due process "protect[ing] property possession."[15] The due process clause of the Fifth Amendment, howerver, affords property only procedural protection, forbidding the District of Columbia form depriving any person of property without due process of lw. There is no absolute, substantive right not to be alienated from one's property. See, E.g., Gilles, 676 F. Supp. at 344 (Fifth Amendment's due process clause "protects against deprivation of property without due process of law") (emphasis in original). Cf. Parratt, 451 U.S. at 537 ("Nothing in [the Fourteenth] Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.'") (citations omitted). Crawford-El received due process before being deprived of his property (see supra (IV (B)), and he is entitled to nothing more under the Fifth Amendment. Accordingly, his substantive due process claim shall be dismissed.

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[15] Pl.'s Opp'n to Motion to Dismiss, at 22-23; Fourth Amended Complaint, at ¶ 49.

The complaint that the Court of Appeals reviewed in this case also alleged a violation of Fifth Amendment due process rights, but the Court of Appeals found this claim "substantively indistinguishable from the access to courts claim" and declined to address it separately. Crawford-El, 951 F.2d at 1316 n.1.

D. Common Law Claim of Conversion

Lastly, Crawford-El claims that Britton's diversion of his property outside government control to an unauthorized person constitutes conversion, and that the District of Columbia is jointly and severally liable for her act of conversion under the doctrine of respondeat superior. (Fourth Amended Complaint, at ¶¶ 46, 47.) See Fotos v. Firemen's Ins. Col, 533 A.2d 1264, 1267 (D.C. App. 1987).

Without considering the merits of this contention, this court must dismiss the claim for lack of jurisdiction. All of Crawford-El's feeral claims are being dismissed, and a District law tail should not be allowed to wag the federal dog. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966).

V. Conclusion

Although defendants have prevailed on their motion to dismiss, theis court expresses appreciation to Crawford-El's court-appointed counsel, Daniel M. Schember, who handled this case since Britton's notice of appeal in an exemplary fashion. His pleadintgs before this court were well0researched and well-argued. He has performed in the highest traditions of the District of Columbia Bar.

All of Crawford-El's federal claims are dismissed, both as against Britton and as against the District of Columbia.[16]

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[16] Crawford-El has brought his federal claims against both Britton and the District. He alleges that her decision to withhold and divert his property executes an unconstitutional District policy or custom, rendering the District liable for her acts. See, e.g., Monell v. Department of Social Services, 436 U.S. 658, 690-94 (1978); Pembaur v. Cincinnati, 475 U.S. 469, 477-484 (1986).

However, there is no need to decide this question because all of Crawford-El's constitutional claims fail aginst Britton herself. Because Crawford-El has not shown that Britton comitted any constitutional violations, the District cannot be held liable for her acts.

Crawford-El's common law claim is also dismissed for lack of jurisdiction. A separate order shall issue this date.

Royce C. Lamberth
United States District Judge

DATE: 2-14-94

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed FEB 15, 1994
Clerk, U.S. District Court
District of Columbia
[Entry Date 2/16/94]

LEONARD ROLLON CRAWFORD-EL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
PATRICIA BRITTON and	)	(RCL)
DISTRICT OF COLUMBIA,	)	
	)	
Defendants.	)	

ORDER

This case comes before this court on defendants' motion to dismiss plaintiff's fourth amended complaint. Having considered defendants' motion and plaintiff's opposition, defendants' motion is hereby GRANTED for the reasons set forth in an accompanying memorandum opinion. The court hereby dismisses the federal claims of plaintiff's fourth amended complaint, both as against defendant Patricia Britton and as against the District of Columbia. Crawford-El's District of Columbia law claim is also dismissed for lack of jurisdiction.

Royce C. Lamberth
United States District Judge

DATE: 2-14-94

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 5, 1992

Mr. Daniel M. Schember
1666 Connecticut Avenue, NW
Suite 225
Washington, D.C. 20009

Re: Leonard R. Crawford-El
v. Patricia Britton
No. 91-1836

Dear Mr. Schember:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

William K. Suter, Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 1991, Decided December 27, 1991

No. 91-7023

LEONARD ROLLON CRAWFORD-EL,
Appellee

v.

PATRICIA BRITTON AND DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS,
Appellants

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 89-03076)

Edward E. Schwab, Assistant Corporation Counsel, Office of the Corporation Counsel, with whom *John Payton*, Corporation Counsel, and *Charles Reischel*, Deputy Corporation Counsel, Office of the Corporation Counsel, were on the brief, for appellants. *Lutz Alexander Prager*, Attorney, Office of the Corporation Counsel, also entered an appearance for appellants.

Daniel M. Schember for appellee.

Before: BUCKLEY and WILLIAMS, *Circuit Judges*, and Alan D. Lourie,* *Circuit Judge*, U.S. Court of Appeals for the Federal Circuit.

Opinion for the Court filed by *Circuit Judge* Williams.

WILLIAMS, *Circuit Judge*: Because of overcrowding in the District of Columbia prison system, plaintiff Leonard Rollon Crawford-El was shuffled about between its Lorton, Virginia facility and several other places of custody. He was first transferred in December 1988 to the Spokane County Jail in the state of Washington, then in the late summer and early fall of 1989 back to Lorton, and ultimately to a federal prison in Marianna, Florida, where he arrived in September 1989. Defendant Patricia Britton, a District of Columbia corrections officer, had charge of arranging his journeys. At the time, he owned three boxes containing clothes and papers relating to several pending lawsuits. At some point (by his account in August or September 1989, by hers in October 1989), Britton delivered the boxes to Crawford-El's brother-in-law, Jesse Carter, rather than simply shipping them to him at the next destination. Some time later Crawford-El's mother secured the boxes and shipped them to him in Florida, where they reached him in February 1990.

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* Sitting by designation pursuant to 28 U.S.C. § 291(a).

Crawford-El sued Britton for damages under 42 U.S.C. § 1983, claiming that her misdelivery of his legal papers to Carter was an intentional interference with his constitutional right of access to the courts. In support he alleged (among other things) various prior conversations between himself and Britton that suggested both her awareness that the boxes contained active legal files and her wish to do him harm. (We review the details below.)

In his brief here Crawford-El also argues that Britton retaliated against him for exercising his First Amendment rights. See Appellee's Brief at 14-19. The complaint makes no reference to this First Amendment claim, however, and the district court quite reasonably did not understand it as raising such a claim, see *Crawford-El v. Britton*, No. 89-3076, Order at 1, Joint Appendix ("J.A.") at 8[1] so we do not consider it here. See *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984).

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[1]The district court did read the complaint as claiming a violation of Crawford-El's due process rights under the Fifth Amendment. *Id.* This appears to be substantively indistinguishable from the access to courts claim, which courts have traced to several constitutional provisions, including the First Amendment, the due process clause, and the privileges and immunities clause. See, e.g., *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986); *Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983). The parties have not addressed any arguments here to a distinct due process claim, and we do not consider it.

Britton moved for dismissal of the complaint and for summary judgment. She asserted a qualified immunity defense under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), arguing that the plaintiff's claims do not make out a violation of any constitutional right "clearly established" at the time of her acts, *id.* at 818. She also argued that the plaintiff had failed to satisfy the "heightened pleading standard" that this circuit applies to damage actions against government officials. The district court denied the motion, *Crawford-El v. Britton*, No. 89-3076, Order (D.D.C. Dec. 21, 1990), and she appeals.

We hold that the complaint has not satisfied our heightened pleading standard, but remand the case to the district court for repleading and reconsideration in light of our opinion.

I.

Our jurisdiction is limited to whether at this stage Crawford-El's claim withstands the qualified immunity defense and satisfies the heightened pleading standard. A district court's rejection of a qualified immunity defense is immediately appealable under the "collateral order" exception to 28 U.S.C. § 1291's requirement of finality, to the extent it turns on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985). Otherwise trial court error could defeat much of the defense's purpose -- to protect officials not only from liability but also from undue burdens of litigation. To determine the relevant facts, we look not only to the pleadings but to the entire record on appeal, viewed, as under Fed. R. Civ. P. 56, in the light most favorable to the party opposing summary judgment (except for the heightened pleading requirement discussed below). See, e.g., *Elliott v. Thomas*, 937 F.2d 338, 341-42 (7th Cir. 1991); *Unwin v. Campbell*, 863 F.2d 124, 130-33 (1st Cir. 1988).

We do not apply the summary judgment model pure and simple, however, as the plaintiff has not yet secured discovery. *Harlow*, 457 U.S. at 818 (discovery should not be allowed until qualified immunity issue is resolved). Our heightened pleading requirement insists that, before discovery, plaintiffs suing government officers for damages set forth "'nonconclusory allegations' that are 'sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds.'" *Andrews v. Wilkins*, 934 F.2d 1267, 1269-70 (D.C. Cir. 1991) (quoting *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C. Cir. 1984)). Because application of the heightened pleading standard precedes discovery, the assumptions of ordinary summary judgment are (as we shall see) not fully applicable.

We note that some of Britton's arguments on appeal take the form of a simple denial -- an "I didn't do it" defense. Immediate review of the district court's treatment of those issues is beyond the scope of *Mitchell's* exception, which exists to supply early review of the *law* "clearly established" at the relevant time. See, e.g., *Elliott v. Thomas*, 937 F.2d at 341-42; *Kaminsky v. Rosenblum*, 929 F.2d 922, 925-26 (2d Cir. 1991); *Ryan v. Burlington County*, 860 F.2d 1199, 1203 n.8 (3d Cir. 1988); *Lion Boulos v. Wilson*, 834 F.2d 504, 509 (5th Cir. 1987); *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987).

II.

To determine whether Britton's qualified immunity defense prevails, we first consider what state of mind must have accompanied her misdelivery of Crawford-El's legal papers to render that action a constitutional tort (or, more precisely, what state of mind would a reasonable officer at the time of the alleged misdelivery have thought rendered it

unconstitutional).[2] Although a purpose of the reasonable-officer standard is to enable a court to decide on qualified immunity without intrusive discovery, *Harlow*, 457 U.S. at 815-19, we have understood *Harlow* to allow inquiry into motive where a bad one could transform an official's otherwise reasonable conduct into a constitutional tort. See *Siegert v. Gilley*, 895 F.2d 797, 800-02 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991); *Whitacre v. Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989); *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1431 (D.C. Cir. 1987); *Halperin v. Kissinger*, 807 F.2d 180, 185-87 (D.C. Cir. 1986); *Hobson v. Wilson*, 737 F.2d at 29-31; compare *Penthouse International, Ltd. v. Meese*, 939 F.2d 1011, 1017 (D.C. Cir. 1991) (no state of mind could make the specified conduct unconstitutional).

Well before defendant's activities in 1989 the Supreme Court decided that prisoners have a general right of access to law libraries or legal assistance. See *Bounds v. Smith*, 430 U.S. 817, 821-25 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). But it doesn't follow that any interruption in Crawford-El's access to his papers was unconstitutional. Prison officials have considerable discretion to implement policies for the administration of correctional facilities and are free to formulate rules (including regulation of inmates' property) that impinge on fundamental rights so long as they are " 'reasonably related' to legitimate penological objectives". *Turner v. Safley*, 482 U.S. 78, 87 (1987). At a minimum, if

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[2] Crawford-El associates the misdelivery with his transfer from Lorton to another prison in Petersburg, Virginia on the way to Florida in August or September 1989, whereas Britton states she delivered the boxes to Carter on October 5, 1989. See Affidavit of Patricia Britton at 3 (Mar. 26, 1990), J.A. at 55. We are aware of no cases between August and October 1989 that would change our analysis.

Britton's delivery of the boxes to Carter was a reasonable means of securing their safe transfer, it would not violate his *Bounds* right.[3]

Plaintiff argues that any "unreasonable" (by which he appears to mean "negligent") withholding or misdelivery of property would violate the *Bounds* right if the parcel contains active legal files. He suggests that prison officials in Britton's position are aware that many prisoners have active legal papers, so that there should be no need to offer specific evidence of awareness of a parcel's contents. Appellee's Brief at 19-20 n.8.

Though Britton's position is more obscure, she implicitly and correctly recognizes that it was clear by 1989 that an officer who interfered with the transmission of an inmate's legal papers for the purpose of thwarting the inmate's litigation violated his constitutional right of access to the courts. See, e.g., *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986); *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986); *Carter v. Hutto*, 781 F.2d 1028, 1031-32 (4th Cir. 1986); *Tyler v. "Ron" Deputy Sheriff*, 574 F.2d 427, 429 (8th Cir. 1978); cf. *Jackson v. Procunier*, 789 F.2d 307, 310-11 (5th Cir. 1986) (allegation that prison officials deliberately held up inmate's mailing of *in forma pauperis* petition stated claim for constitutional violation); *Washington v. James*, 782 F.2d 1134, 1138-39 (2d Cir. 1986) (interference with legal

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[3] At worst, the act might constitute a common law conversion, *Fotos v. Firemen's Ins. Co.* 533 A.2d 1264, 1267 (D.C. 1987), but that is a separate question that has no direct bearing on whether the act violated Crawford-El's *Bounds* right. We reject his contention to the contrary. See Appellee's Brief at 22.

mail states claim for violation of right of access).[4] Under this specific intent standard, Britton's act would constitute a violation of Crawford-El's *Bounds* right only if she knew his property contained legal papers relevant to pending litigation *and* she diverted the property with the purpose of interfering with his litigation, or at least with deliberate indifference to such interference. (Hereafter we use "intent to interfere" as encompassing deliberate indifference.)

It cannot, however, be said that anything like Crawford-El's proposed negligence standard was clearly established in 1989 (or now, for that matter). Perhaps the broadest ruling is *Jackson v. Procunier*, which held a *Bounds* claim would be shown if "mail officers *deliberately* held up [the plaintiff's] mail when they *should reasonably have known* that the delay would deprive him of his right of access to the courts". 789 F.2d at 311 (emphasis added). The delayed envelope stated that it contained legal materials that had to be in court by a specific date one week later, *id.* at 308, and the resulting delay cost the prisoner dismissal of his appeal. Thus, the court was presumably holding that it was enough to allege knowing delay of legal papers, with awareness of some (at least nontrivial) *likelihood* that the delay would defeat the inmate's claim. The other cases appear similarly to require either an intent to thwart the prisoner's access to courts, or at a minimum deliberate or reckless indifference to a foreseeable disruptive effect. See, e.g., *Simmons v. Dickhaut* 804 F.2d at

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[4] Our circuit has not spoken to this issue. However, the unanimity among those circuits that have done so, together with the fact that "[i]t follows logically [from *Bounds*] that the allegation of intentional violation of the right of access to the courts states a cause of action under § 1983", *Simmons v. Dickhaut*, 804 F.2d at 183, suggests that a reasonable official would know that intentional deprivation of the *Bounds* right violates the Constitution.

184 (inmate claimed prison officials withheld legal material from property returned to him, although he three times requested and identified it); *Carter v. Hutto*, 781 F.2d at 1031-32 (inmate claimed that prison officials deliberately seized and destroyed handwritten notes of his trial, the basis of his habeas claim); *Patterson v. Mintzes*, 717 F.2d 284, 288-89 (6th Cir. 1983) (inmate denied access to his transcripts and legal papers necessary for court appearance despite several specific requests identifying his critical dependence on the documents). Thus, while the cases "clearly establish" that Crawford-El had a constitutional right against any official who interfered with his access to active legal files with intent to impair that access, they do not establish the broader right that he claims.

Quite apart from the issue of qualified immunity, we doubt if an act such as Britton's could violate the *Bounds* right unless done with an intent to interfere with litigation (or, to repeat, with deliberate indifference to such interference). If it could, a prisoner could easily transform almost any negligent delay in the transfer of his property (which would not otherwise violate the Constitution, see *Daniels v. Williams*, 474 U.S. 327, 336 (1986) into a constitutional tort if the property contained active litigation papers. Defendant's theory, that officials are generally aware that prisoners are frequently engaged in litigation and should be liable for any negligent delay, could extend (for example) to any mail carrier handling prison mail and negligently delaying its delivery.

Accordingly, to withstand Britton's motion to dismiss, Crawford-El must have made specific nonconclusory allegations showing that Britton knew his property contained legal materials relating to pending cases *and* that she diverted his property with the intention of interfering with his litigation.

On the first point, Crawford-El claims to have informed Britton that his boxes contained legal papers:

> On Friday August 18, 1989, I spoke to defendant Patricia Britton at the Western Missouri Correctional Center [while en route from Washington State back to Lorton]. D.C. offenders Danny Phillips and James Neal and I were talking to Britton and each informed her that our legal material pertaining to current cases was in our property and was necessary in order for us to seek redress from the courts.

Affidavit of Leonard Crawford-El at 1 (May 3, 1990), J.A. at 73; see also Complaint at 2, J.A. at 28.

Crawford-El also alleges specific facts suggesting an intention to interfere with his pursuit of his legal claims. *First*, he has provided evidence of Britton's general hostility to him. He alleges[5] that after he was quoted by reporters in an April 20, 1986 *Washington Post* article criticizing conditions at Lorton, Britton rebuked him for cooperating with the reporters and "told plaintiff that so long as he was incarcerated she was going to do everything she had to make it as hard for him as possible as a result of his having met and spoke [sic] with the reporters and for allegedly embarassing [sic] her before her coworkers thru the article." Amended Complaint at 2 (Sept. 6, 1990), J.A. at 16.

Crawford-El also states that after his transfer to Spokane he was quoted several times in a December 17, 1989 [sic; presumably *1988*] *Washington Post* article about the

[5] The facts are described below according to Crawford-El's allegations and offers of proof; for the purposes of this appeal we do not have jurisdiction to consider Britton's denials of certain allegations, for the reasons set forth in Part I.

transfer, and thereafter "was locked down and officials there informed him that Defendant Britton had told them Plaintiff was a 'Troublemaker'." *Id.* This adds only a very little; we suspect that even prison officials free of hostility toward Crawford-El might regard "troublemaker" as an apt moniker.

Crawford-El's final claim of general hostility is that he learned (from an unidentified source) that Britton, after conveying his property to Carter, had told Carter that Crawford-El "should be happy she did not throw it in the trash." Complaint at 3, J.A. at 29. This contention is undermined by Crawford-El's acknowledgment of Carter's statement that Britton, when asking him to pick up the property, had told him she was afraid it might otherwise be lost. *Id.*

Two of these assertions appear to be pure hearsay -- Crawford-El's statements that "officials" at Spokane told him that Britton told them Crawford-El was a "troublemaker" and that someone (Carter?) told him that Britton had said Crawford-El was lucky she did not throw his property in the trash. Normally such hearsay would not be enough to raise an issue of fact for summary judgment purposes. See Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); see also 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2738, at 470-74 (2d ed. 1983). Britton may have waived the objection, see *id.* at 507-09; *In re Teltronics Services, Inc.*, 762 F.2d 185, 1192 (2d Cir. 1985), but the more important point is that there has been no opportunity for discovery. Accordingly, the heightened pleading requirement demands only that plaintiff "relate[e] the pertinent information that is already in his possession." *Hunter v. District of Columbia*,

943 F.2d 69, 76 (D.C. Cir. 1991). Inadmissible hearsay reports of the defendant's *specific* statements indicating malicious intent can satisfy that standard. Counsel involved in the drafting of such reports will doubtless be alert to the possible Rule11 hazards.

Second, Crawford-El bolsters the impact of Britton's statements with a claim of disparate treatment: He alleges that he and other prisoners who had complained about being videotaped during the transfer were not sent their property, whereas others being transferred were sent theirs. See Affidavit of Leonard Crawford-El at 4-5, J.A. at 76-77 (asserting that D.C. inmates who filed notices of intent to sue over the videotaping and/or were named as plaintiffs in the lawsuit over the videotaping, "experienced the same intentional deprivations as plaintiff at the hands of Britton who is also a defendant" in that case, whereas "D.C. offender John McNeil and others [being transferred from Washington State] property was [sic] in R + D in Lorton and given to them"); see also Attachments to Appellee's Brief at 1-14, J.A. at 82-87 (copy of complaint in *Alton Best v. District of Columbia*, lawsuit over videotaping); Attachments to Appellee's Brief at 38-45 (notices of intent to sue by Crawford-El, James Neal, Danny Phillips, and Kenneth Ward).

Third, Crawford-El states that prison authorities would not permit him to receive property mailed outside prison channels, even by a family member. Complaint at 4, J.A. at 30. Thus, when his mother finally mailed him his property, he was initially denied access to the materials and secured them only by filing an administrative complaint with the Marianna, Florida warden. Amended Complaint at 3, J.A. at 17. If Britton was aware of the practice, this would supply a reason why she could have believed that delivery to Carter might thwart Crawford-El's litigation efforts.

Taking Crawford-El's allegations and supporting evidence of unconstitutional motive as a whole, we find them "specific and concrete enough to enable [Britton] to prepare a response, and . . . a motion for summary judgment based on qualified immunity." *Whitacre v. Davey*, 890 F.2d at 1171. The allegations in *Martin v. D.C. Metropolitan Police Department*, which we rejected, 812 F.2d at 1435, were by comparison quite vague. The plaintiff claimed that he had been arrested for burglary in retaliation for a civil lawsuit that he pressed against certain officers who had beaten him with nightsticks in an episode captured on videotape and broadcast on the local news. His arrest was by *other* police officers, and against them plaintiff could only claim that they had reviewed the videotape of the beating; that he was the only person identified and prosecuted as a result; that defendants worked closely with the prosecutor on the case; and that an unusually large number of officers arrested him. *Id.* Here Crawford-El has identified specific statements by Britton to him and others showing awareness that his boxes contained litigation papers and that she was hostile; and he has identified specific persons also involved in documented legal conflict with Britton and (according to him) subjected to adverse treatment of their property, in contrast with others. For summary judgment purposes Britton should be able to meet these assertions with specific affidavits.

Although Crawford-El has adequately specified evidence of Britton's intent, he has offered none showing that Britton's actions actually deprived him of his right of access to courts. While our past decisions have mainly focused on the need for specifics bearing on the intent element of a constitutional damage action, *Hunter v. District of Columbia* makes clear that the policy behind the qualified immunity defense -- concern over "the social cost of distracting government officials with litigation", 943 F.2d at 75 --

requires that the complaint as a whole satisfy the heightened pleading standard.

Some of Crawford-El's damage allegations relate to impacts on his litigation -- assertions that the delay "made it impossible for him to proceed in an organized manner," Amended Complaint at 4, J.A. at 18, that he was "prevented from assisting his attorneys . . . in that he was not able to refer to his records and notes", *id.*, that his "filing of several small claims in D.C. was delayed unnecessarily", *id.*, and that the defendant's acts "were the proximal [sic] cause of the dismissal of one pro se case [with a specific title]". Except for the one reference to dismissal of a case, unsupported by any detail, none of these shows actual deprivation of access to the courts.

We agree with those circuits holding that where a plaintiff seeks relief for an isolated episode of interference with his right of access to a law library, legal materials, or legal assistance, he must allege an actual injury to his litigation. Thus, in *Chandler v. Baird*, 926 F.2d 1057, 1063 (11th Cir. 1991), the court held that actual prejudice was necessary where the "alleged deprivations are of a minor and short-lived nature and do not implicate general policies." See also *Sowell v. Vose*, 941 F.2d 32, 35 (1st Cir. 1991) (drawing a similar line, and noting that the only injury from certain delays was plaintiff's need to seek extensions of filing deadlines); *Sands v. Lewis* 886 F.2d 1166, 1169-71 (9th Cir. 1989) (drawing distinction between an "absolute" deprivation of access to legal materials and a "conditional restriction", for which actual injury must be shown); *Peterkin v. Jeffes*, 855 F.2d 1021, 1039-42 (3d Cir. 1988); *Hossman v. Spradlin*, 812 F.2d 1019, 1022 (7th Cir. 1987); *Holloway v. Dobbs*, 715 F.2d 390, 392 (8th Cir. 1983); cf. *Washington v. James*, 782 F.2d at 1140-41 (Cardamone, J., dissenting) (rejecting majority's view that complaint alleged *regular* interference

with plaintiff's legal correspondence, dissenter would have dismissed the claim for want of "*actual denial* of access to federal courts") (emphasis in original); *Mann v. Smith*, 796 F.2d 79, 83-84 & n.5 (5th Cir. 1986) (requiring actual injury where alleged violation took form of inadequate " 'checkout' system for law books"). This requirement flows from the general principle that some showing of injury is a prerequisite to a constitutional tort action. See, e.g., *Butz v. Economou*, 438 U.S. 478, 504 (1978) ("the decision in *Bivens* [the federal analog of § 1983] established that a citizen *suffering a compensable injury* to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official") (emphasis added); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned."); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) ("even in the field of constitutional torts *de minimis non curat lex*. . . . A tort to be actionable requires injury.").

The only concrete (legal) injury cited by Crawford-El is the dismissal of one *pro se* action filed in the federal district court in Maryland. See Complaint at 4, J.A. at 18; Opposition to Defendant's Motion for Reconsideration at 6 (May 21, 1990), J.A. at 99. But that action was dismissed on May 4, 1990, well after Crawford-El recovered his legal materials in early February 1990; indeed, the district judge had extended the deadlines for discovery and summary judgment motions to March 27, 1990, and April 26, 1990, respectively. See J.A. at 109-10. Thus, like the plaintiff in *Sowell v. Vose* who secured extensions to accommodate access delays wrongly inflicted upon him, Crawford-El has failed to link his deprivation to any adverse litigation effect.

Crawford-El has also alleged losses completely peripheral to his litigation -- the cost of underwear and shoes during the eight months he was denied access to the clothes in his property; the cost of mailing the boxes from the District to the Florida facility; and emotional distress. See Amended Complaint at 4, J.A. at 18. These do not help show a violation of the *Bounds* right; the character of that right defines the injury requirement. If there is no denial of access to the courts, the presence of legal records in the diverted boxes cannot turn a garden-variety property deprivation into a *Bounds* claim.

III.

Although we hold that Crawford-El's complaint does not satisfy our heightened pleading standard, we remand the case to the district court for repleading. On remand Crawford-El should be permitted to add, if he can, nonconclusory allegations that would show the actual injury necessary to support his *Bounds* claim. Since the proceedings in district court, our *Hunter* decision has made clear the scope of the heightened pleading requirement; as plaintiff prevailed in district court and his pleadings were *pro se*, the case for a remand to comply with those requirements is more compelling than in *Hunter* itself. Permission to file additional amendments to the complaint, such as to raise plaintiff's new First Amendment theory, lies in the sound discretion of the district court. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). We note, however, that even First Amendment claims appear to be subject to a *de minimis* rule. See *Bart v. Telford*, 677 F.2d at 625.

Reversed and remanded.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed May 10, 1990
Clerk, U.S. District Court
District of Columbia

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON,	)	
	)	
	)	
	)	
Defendant.	)	

ORDER

1. Defendant Patricia Britton's motion to dismiss is DENIED.

2. The District of Columbia is substituted for the District of Columbia Department of Corrections as defendant. Defendant District of Columbia's motion to dismiss is GRANTED.

3. Defendant Britton shall respond to plaintiff's outstanding discovery requests by May 17, 1990.

4. The District of Columbia shall treat plaintiff's outstanding discovery requests as having been served on it as a non-party and shall respond to the requests by May 17, 1990.

5. Defendant Britton shall file any written discovery requests by May 24, 1990.

6. A further status conference shall be held May 25, 1990 at 9:30 a.m.

SO ORDERED.

Royce C. Lamberth
United States District Judge

DATE: May 10, 1990

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed August 31, 1990
Clerk, U.S. District Court
District of Columbia

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON,	)	
	)	
	)	
Defendant.	)	

ORDER

This case comes before the court on defendant Patricia Britton's motion for reconsideration of the court's order of May 10, 1990, denying defendant Britton's motion to dismiss, and the opposition thereto.[1] As grounds for her motion, Britton cites the case of Siegert v. Gilley 895 F.2d 797 (D.C. Cir. 1990). Because the court did not consider

[1] The District of Columbia, which is no longer a party to this action having been dismissed by the court on May 10, 1990, unsuccessfully attempts to join in defendant Britton's motion.

Siegert when it ruled on defendant's motion to dismiss, it will grant the motion to reconsider.

Plaintiff is a prisoner who claims that defendant deprived him of his legal materials with the intent of interfering with his access to the courts in violation of the Sixth Amendment and in violation of his due process rights under the Fifth Amendment.

Plaintiff was transferred from the Maximum Security Facility at Lorton, Virginia to the Washington State inlate 1988. After being transferred within facilities within Washington State, plaintiff was informed on July 28, 1989 that he would be returning to Lorton. Instead of being shipped back to Lorton, however, plaintiff was sent to the Western Missouri Correctional Center in Cameron, Missouri on August 9, 1989. Plaintiff's property, including his legal papers from on-going court cases, was not sent to Missouri because plaintiff was only expected to be there a week. When he arrived at Lorton on August 19, 1989, his propety did not arrive despite plaintiff's numerous inquiries to defendant Britton and to the Director of the D.C. Department of Corrections before his journey, and after his arrival. On September 7, 1989, plaintiff was transferred from Lorton to the Federal Bureau of Prisons at Petersburg, Virginia, without first receiving his legal material. While at Petersburg, plaintiff learned that Ms. Britton had contacted his brother-in-law without plaintiff's permission, and arranged for plaintiff's brother-in-law to receive plaintiff's property. Plaintiff finally received his material in February 1990, eight months after being separated from it by defendants.

The Court of Appeals for this Circuit explored the doctrine of qualified immunity and how it applies to cases which necessarily call into question the subjective intent of the government official.

> [W]hen the governing precedent identifies the defendant's intent (unrelated to knowledge of the law) as an essential element of the plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of the defendant's alleged unconstitutional purpose.

Id. at 801, citing Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425, 1433 (D.C. Cir. 1987). The court went on to examine the standard of pleading required of plaintiffs in cases involving such allegations. After examining the case law and the general purposes of qualified immunity doctrine, the Court of Appeals concluded that "in order to obtain even limited discovery, such intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent." Siegert 895 F.2d at 802.

Plaintiff, who is representing himself pro se, argues that Ms. Britton had knowledge that the deprivation of his legal papers violated his constitutional rights because plaintiff had informed her so. Therefore he concludes that her failure to insure that his papers were immediately forwarded to him constituted a willful and intentional deprivation of constitutional rights. This sort of proof seems to border on circumstantial, the reliance upon which Siegert forbids. During the course of hearings on the motion to dismiss and the motion to reconsider, however, plaintiff has related to the court direct evidence of defendant Britton's intent. Plaintiff described an incident which took place in 1986 in which defendant Britton told plaintiff that he was a "troublemaker" because he had complained to Washington Post reporters about conditions at Lorton. Plaintiff claims that Britton promised to make his incarceration as hard as possible as a result of his having talked with the reporters. Plaintiff has

submitted certified copies of the newspaper articles in which he was quoted. Plaintiff has referred to the threat of Ms. Britton in his opposition to the motion for reconsideration, but there is no description or reference to the incident in either the complaint or in plaintiff's affidavit attached to the complaint.

Because the plaintiff is a pro se prisoner who is without the advantages of legal training that might assist him in making out a more complete complaint, this court will allow plaintiff an opportunity to amend his complaint to add reference to the incident which took place in 1986 which supports plaintiff's claim that Ms. Britton's intent was to deprive him of his constitutional rights, and that the mishandling of his legal papers was not bureaucratic error.

During the course of hearings on the motion to dismiss and the motion to reconsider, plaintiff has also made reference to unfavorable decisions made in his other cases pending in other courts as a result of his inability to respond without his legal materials. In order to clarify this for the court and for the defendant, the court asks that plaintiff specify in his amended complaint exactly what harm has befallen him as a result of the deprivation of his legal documents, as well as any other harm that occurred because of the handling of his property.

Upon consideration of the above analysis, and for the reasons stated in open court on May 10, 1990, plaintiff shall be allowed to amend his complaint to comply with Siegert v. Gilley 895 F.2d 797 (D.C. Cir. 1990), and to allege his direct evidence of defendant Britton's unconstitutional intent. Therefore, it hereby is ORDERED that:

1. Defendant Britton's motion for reconsideration is GRANTED.

2. Plaintiff shall have 20 days in which to amend his complaint and allege direct evidence of defendant Britton's unconstitutional intent or the court will dismiss this action based on defendant Britton's qualified immunity.

SO ORDERED.

Royce C. Lamberth
United States District Judge

Aug. 31, 1990

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed December 21, 1990
Clerk, U.S. District Court
District of Columbia

LEONARD ROLLON CRAWFORD-EL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.89-3076
	)	(RCL)
PATRICIA BRITTON,	)	
	)	
	)	
Defendant.	)	

ORDER

This matter came before the court for a status conference on November 28, 1990.

Plaintiff, who is currently proceeding pro se, was present, as was Assistant Corporation Counsel Kenneth Marty, appearing on behalf of defendant Patricia Britton.

Plaintiff complied with this court's order of August 31, 1990, and filed an amended complaint with allegations of direct evidence of defendant Britton's unconstitutional intent,

and with specifications of how plaintiff has been harmed as a result of defendant's actions.

Defendant Britton filed an answer to the amended complaint on November 20, 1990.

At the status conference, defendant's counsel indicated that defendant continues to urge the court to dismiss the amended complaint, for the same reasons originally argued, i.e., that the complaint as amended still fails to state a claim upon which relief may be granted or over which this court has jurisdiction, and that defendant is entitled to official immunity. The court deemed these comments to be an oral motion to dismiss, on the same grounds as originally presented by defendant. Defendant's motion to dismiss is hereby DENIED, for the reasons set forth in the court's order of August 31, 1990, and herein.

Plaintiff is present in this jurisdiction on a writ of habeas corpus ad testificandum issued on March 15, 1990. He shall remain here and shall be held at the D.C. Jail until disposition of this case, or further order of the court.

Plaintiff complained that he has been denied access to the law library at the D.C. Jail. Assistant Corporation Counsel Marty shall file a report with the court no later than January 2, 1990, regarding plaintiff's use of the law library. In his report, Mr. Marty shall also report regarding whether plaintiff has now been allowed to review his D.C. Department of Corrections' file.

SO ORDERED.

Royce C. Lamberth
United States District Judge

APPENDIX M

Date: Dec.21, 1990

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

NO. 91-7023

September Term, 1991
CA 89-03076

Leonard Rollon Crawford-El

U.S. Court of Appeals
For the District of
Columbia Circuit

v.

FILED Feb. 14, 1992

Patricia Britton

Appellant

BEFORE: Buckley, Williams and Lourie,* Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed January 27, 1992, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. §291(a).

Robert A. Bonner
Deputy Clerk

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARD ROLLON CRAWFORD-EL
DCDC No. 176-323
Maximum Security Facility
P.O. Box 5200
Lorton, VA 22079
703/643-2256,

Plaintiff,

v.

Civil Action No. 89-3076 (RCL)

PATRICIA BRITTON
D.C. Department of Corrections
1923 Vermont Avenue, N.W.
Washington, D.C. 20001
202/673-7316

and

DISTRICT OF COLUMBIA
Serve: Mayor of D.C.
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202/727-6319,

Defendants.

FOURTH AMENDED COMPLAINT FOR DAMAGES, DECLARATION, AND INJUNCTION
(First and Fifth Amendments, Right of Court Access, and Common Law)

Nature of the Case

1. This is a civil rights and common law action by a District of Columbia prisoner against a D.C. Department of Corrections official and the District of Columbia. Plaintiff claims the official, Patricia Britton, diverted his property outside government control to an unauthorized person in violation of District of Columbia common law. Plaintiff also claims the diversion of his property violated his First Amendment rights to speak and to seek redress of grievances because Ms. Britton was motivated by hostility toward him due to his authorized communication with newspaper reporters, his informal requests for redress of grievances, his assistance to other prisoners in seeking redress, his authorized formation and leadership of a prisoner grievance committee, his persistent requests for return of his property, and his past, pending, and contemplated litigation against her, other Department of Corrections employees, or the District of Columbia. Apart from this claim of unconstitutional motive, plaintiff claims that Ms. Britton diverted his property either knowing, or with reckless disregard and deliberate indifference to whether, it included materials plaintiff needed to pursue legal redress--papers filed in pending federal civil actions he had brought *pro se* and *in forma pauperis*, papers recording the facts of contemplated federal court damage actions, and a photograph plaintiff reasonably believed to be evidence that would support a postconviction motion in his criminal case. Plaintiff claims Ms. Britton's diversion of these legal materials violated his First Amendment right to petition for redress, his constitutional right of court access, and his Fifth Amendment rights to substantive and procedural due

process. Plaintiff claims the District of Columbia is liable for Ms. Britton's common law violation under the doctrine of *respondeat superior*, and is liable for the constitutional violations either because Ms. Britton acted as a District of Columbia policymaker or because District custom, policy, or practice proximately caused her unconstitutional conduct.

Jurisdiction

2. The Court has jurisdiction under 28 U.S.C. §§1331, 1343(a)(3), 1367, and 2201.

Parties

3. Plaintiff, a lifelong resident of the District of Columbia, is and at all relevant times was a District of Columbia prisoner. He presently is confined in a District of Columbia Department of Corrections facility and is subject to the policies of the District of Columbia concerning prisoner property. Among plaintiff's property are his only copies of legal papers he needs to pursue administrative or judicial redress for legal wrongs, through proceedings in which he represents himself.

4. Defendant Britton is and at all relevant times was an employee of the District of Columbia Department of Corrections. At all relevant times, she was responsible for administering and formulating District of Columbia policy for a program of interstate prisoner transfers involving plaintiff. Plaintiff's claims arose from her acts done in exercise of this authority. Defendant Britton is sued in her individual capacity.

5. Defendant District of Columbia is a body corporate and defendant Britton's employer. The District is liable for unconstitutional acts either done by Ms. Britton in exercise of

policymaking authority or caused by District of Columbia policy, custom, or practice.

Facts

6. From about October 1985 until about the end of April 1986 plaintiff was a resident of the District of Columbia Department of Corrections Occoquan Facility in Lorton, Virginia. During that time defendant Britton was plaintiff's Classification and Parole Officer. Plaintiff was housed in K2 Dorm, but was employed as the Clerk for Captain Vera Brummell, who at the time was a lieutenant in charge of the Q Block Housing and Adjustment Board. Plaintiff typed, copied, and filed papers for the Board, and did other clerk duties. Ms. Britton's office was nearby in P Block. Plaintiff had frequent contact with Ms. Britton, since she often served on the Q Block Housing and Adjustment Board and plaintiff frequently went to P Block to photocopy papers as part of his duties. Ms. Britton persistently displayed toward prisoners a cavalier attitude-- manifesting a view that prisoners were beneath her, disentitled to dignity, and unworthy of civil treatment. Ms. Britton was hostile to plaintiff, in particular, because she knew plaintiff, when housed at the Central Facility before coming to Occoquan, had been in charge of the law library, had helped many prisoners prepare Administrative Remedy Procedure (ARP) grievance forms or appeals of disciplinary decisions, and had a reputation for asserting legal rights and knowing the administrative procedures for doing so. Ms. Britton deemed plaintiff "too big for his britches."

7. Plaintiff and several other prisoners perceived conditions at Occoquan to be terrible. Prisoners turned to plaintiff for assistance and leadership. On behalf of several prisoners plaintiff wrote numerous ARP complaints, noting such problems as unavailability of sufficient, proper clothing, and repeated inability of the correctional staff to "clear the count"

(ensure all prisoners are accounted for) in time for prisoners to get to their morning educational programs. Lt. Nelson was assigned to investigate these complaints and met several times with plaintiff to discuss them. On one occasion Lt. Nelson suggested that plaintiff should gather other prisoners and meet personally with Administrator Decatur to discuss conditions at Occoquan. Lt. Nelson asked plaintiff to write up the problems on one document and said he would transmit the document unofficially to Administrator Decatur and arrange a meeting with a prisoner delegation. Plaintiff wrote the document and then went from Dorm to Dorm selecting one representative and one alternate from each to join him as members of an Inmate Grievance Committee. Soon, a series of Committee meetings with the Administrator was held.

8. The activities of the Inmate Grievance Committee, though authorized, were controversial. Some correctional officers, like Lt. Nelson, approved, believing the communication process desirable to help diffuse tensions, which many perceived to be reaching an explosive level. Others, such as recently arrived Assistant Administrator Melvin Jones, were hostile. At one meeting Mr. Jones heatedly denounced the Committee. Plaintiff responded sharply, saying if Mr. Jones did not have a constructive contribution to make he should leave. Administrator Decatur then excused Assistant Administrator Jones from the meeting.

9. Ms. Britton was among those who were hostile to the Inmate Grievance Committee and to plaintiff's efforts to seek redress of prisoner grievances. On one occasion when plaintiff was typing Board papers in the Q Block office, Ms. Britton came in and said to Cpt. (then Lt.) Brummell in a caustic manner that she (Cpt. Brummell) should watch out for plaintiff and make sure he wasn't using the typewriter to write up ARPs or lawsuits. As Ms. Britton said this she stood over plaintiff to see what he was typing.

10. In April 1986 a prisoner mentioned to plaintiff that a reporter from The Washington Post had called to inquire about what was happening at Occoquan. Plaintiff then called reporters he knew at the paper and invited them to visit. Plaintiff submitted to Ms. Britton a visitor application. He indicated the address of the proposed visitors as 1150 15th Street, N.W., Washington, D.C. 20071, which is the address of The Washington Post. Ms. Britton approved the visitor application.

11. A reporter for the newspaper came to Occoquan and interviewed plaintiff, other prisoners, and Department of Corrections employees. Based on these interviews another reporter wrote a front-page article for the Sunday, April 20, 1986 issue of The Washington Post entitled "Jail Crisis Spills Into Occoquan Unit," with a subheading, "Crowding, Anger Grow as D.C. Inmates are Shifted to Va. Facility." Referring to plaintiff, the article said:

> In particularly crowded times, the floor of the cell block has been turned
> into a sleeping area for newly arrived inmates, according to Leonard Crawford, an inmate who served as the cell block's head clerk for four months and has organized a group of inmates pressing for better conditions. Crawford said staff members, documenting the reasons for holding the inmates in the cell block, simply wrote "lack of bed space" in the dorms.
>
> * * *
>
> Crawford said that when he arrived at Occoquan in October on a parole violation, a correctional officer searched the lockers of the other inmates in his dorm until he found one with three pairs of institution-gray trousers, and then gave one pair to him.
>
> * * *

While city officials credit the [educational] classes with a significant increase in the percentage of inmates passing the [high school] equivalency tests, only a few of the inmates whom corrections officials hoped to reach attend.

One teacher estimated the average class size at Occoquan at six or seven students. Crawford, an inmate now working as head clerk for the educational program, said that 135 of the nearly 600 inmates at Occoquan 2 are enrolled.

12. The day after the article was published, defendant Britton ordered plaintiff into her office. Corporal Barrett, then Officer in Charge of Dorm K2, escorted plaintiff there. Ms. Britton was visibly upset. After ignoring plaintiff for a considerable period, she asked him if he had arranged the visit by the reporter. When plaintiff said he had, she asked him how he had done it. Plaintiff showed her the visitor application naming the reporters invited and their address and pointed out that Ms. Britton had approved the application. Ms. Britton became enraged and accused plaintiff of tricking her. Plaintiff denied tricking her. Ms. Britton said plaintiff had embarrassed her before her coworkers by having the reporter come. Ms. Britton made a telephone call trying to get plaintiff placed in restrictive confinement in Q Block. When this effort failed she said that so long as plaintiff was incarcerated she was going to do everything she had to to make it as hard for him as possible. A few days later Ms. Britton had plaintiff transferred to the Department's Central Facility.

13. On October 31, 1986 plaintiff filed a lawsuit against the D.C. Department of Corrections in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia. The case was assigned No. SC 30003 '86. Plaintiff claimed that on Sunday August 24, 1986 his personal property--including clothing, jewelry, and photographs--was

stolen due to the failure of correctional staff to secure it upon committing plaintiff to control cells. On November 28, 1986, after trial, the court entered judgment for plaintiff in the amount of $553.00.

14. In October 1987 plaintiff, appearing *pro se*, filed *in forma pauperis* a federal court class action complaint challenging the failure of the D.C. Department of Corrections to provide to Islamic prisoners food compatible with their religious beliefs. Leonard R. Crawford-El v. Edwin Meese, Civ. A. No. 87-2808 (D.D.C. filed October 16, 1987). In early 1988 plaintiff filed another *pro se, informa pauperis* lawsuit claiming the D.C. Department of Corrections was violating his right to practice his religion. Leonard Rollon Crawford-El v. Mayor Marion Barry, Civ. A. No. 88-0715 (D.D.C. filed March 16, 1988). Shortly thereafter, plaintiff filed a *pro se, informa pauperis* federal court action seeking damages for legal malpractice. Leonard R. Crawford-El v. Samuel M. Shapiro, et al., Civ. A. No. 88-2339 (D.D.C filed August 17, 1988).

15. On December 14-15, 1988, while all of the lawsuits identified in paragraph 14 were pending, plaintiff was transferred with several other prisoners to the Spokane County Jail in Washington State. Ms. Britton had administrative and policymaking responsibility for the transfer and personally accompanied the prisoners on the trip. During the trip Correctional Officer Ballard, with Ms. Britton's knowledge, made a videotape of the prisoners while they were handcuffed, leg-shackled, and chained about their waists. Plaintiff and several others protested to Ms. Britton that the videotaping violated their privacy rights. Plaintiff said to her that the videotaping could not be done without the prisoners' written authorization. Ms. Britton responded, "You're a prisoner, you don't have any rights."

16. On arrival in Spokane, plaintiff, other prisoners, and corrections officials were interviewed by a reporter for The Washington Post. The reporter wrote a front-page article for the Sunday, December 18, 1988 issue of the newspaper under the headline, "Sudden Move Severs Inmates' Ties to D.C.; Isolation of Spokane Jail Puts Prisoners 'In a Firecracker Mood.'" Referring to plaintiff, the article stated:

> For three hours Friday, [Spokane] jail officials permitted a Washington Post reporter and photographer to speak and mingle freely with the District inmates--an opportunity that had been denied for months by officials of the beleaguered D.C. Department of Corrections.
>
> * * *
>
> Module 6W, where the District's prisoners have been isolated from the jail's population, is a surly, embittered place.
>
> * * *
>
> It is a place populated by convicts stripped not just of their liberty and their dignity, but also of the chance to hug their parents and watch their children and grandchildren grow. "We're in a firecracker mood," said Leonard Crawford-El, who is serving a life sentence for murder. "This is a bunch of angry, frustrated men."
>
> * * *
>
> The inmates are particularly suspicious that they were handpicked for transfer to Spokane because they were "jailhouse lawyers"--trouble-making "writ-writers" who tied up the courts with occasionally successful lawsuits against the prison system.
>
> "What you have here are the civil litigants of Lorton who have been put here to get us out of their hair so our lawsuits will be dismissed on procedural grounds," Crawford-El said.

> D.C. officials deny it, and insist that the main criterion for selecting the inmates was that none be eligible for parole before 1993.

17. Shortly after publication of this article, Ms. Britton told Captain Manning of the Spokane County Jail that plaintiff was a "legal troublemaker," meaning a prisoner who asserts her or his legal rights, or seeks administrative or judicial redress of grievances.

18. Within six months of the videotaping incident, plaintiff and other prisoners notified the District of Columbia under D.C. Code §12-309 of their claim for damages stemming from the videotaping. Later, in December 1989 plaintiff and the others filed suit against Ms. Britton, Officer Ballard, and the District of Columbia over the videotaping. The lawsuit is Alton A. Best, et al., v. The District of Columbia, et al., Civ. A. No. 89-3382 (LFO) (D.D.C.).

19. In late July 1989 plaintiff was informed by Washington State officials that all D.C. prisoners would be returning to D.C. facilities at Lorton, Virginia and that he must take all his property to the prison property room for boxing and shipping. Plaintiff did so and requested in writing that his property be mailed to him. Plaintiff's property--all properly obtained while incarcerated, and none of it contraband--was boxed and sealed with a written description of the property secured to the outside. The first entry in the written description stated the property included law books and ten legal folders. Among these papers were (a) plaintiff's only copies of documents filed in the lawsuits identified in paragraph 14, as well as those filed in two other federal court civil actions which plaintiff had brought *pro se* and *in forma pauperis*, Leonard R. Crawford-El v. Samuel Shapiro, et al., Civ. A. No. JFM-89-2060 (U.S. D. Ct., Md.), and Leonard R. Crawford-El v. Doctor Dugdale, et al., No. C89-377T3 (U.S.D.Ct., W.D. Wash.);

(b) plaintiff's only records pertaining to legal claims subsequently submitted pro se against the U.S. Marshals Service for loss of a watch and eyeglasses and against the U.S. Bureau of Prisons for injuries stemming from a beating by prison guards at the El-Reno Federal Correctional Institution; and (c) the only existing copy of a photograph plaintiff reasonably believed to be evidence that would support a postconviction motion in his criminal case.

20. On August 9, 1989, plaintiff was taken to the Western Missouri Correctional Center in Cameron, Missouri. On August 18, 1989 a group of D.C. correctional officers led by Ms. Britton arrived at the Center. Plaintiff and D.C. prisoners James Neal and Danny Phillips met with Ms. Britton. Each informed her that his property included legal material pertaining to current cases and that the legal material was necessary in order for them to seek redress from the courts. Ms. Britton smirked and acted and spoke in a cavalier manner. She informed plaintiff that she understood his need for both his personal property and legal material and that she would personally see to it that plaintiff would get them. She said she had decided not to have Washington State officials send plaintiff's property directly to him, and that she had told the officials to send all the D.C. prisoners' property to her office at 1923 Vermont Avenue, N.W., Washington, D.C. 20001. She said plaintiff's property would be given to him once he reached Lorton.

21. Shortly thereafter, plaintiff and other D.C. prisoners traveled from Cameron to Lorton by chartered buses. Ms. Britton was in charge and rode on one of the buses. As plaintiff and the others were being handcuffed and shackled to board the bus, Ms. Britton took possesion of property plaintiff had purchased or received in Cameron--canteen items, a letter with pictures, and stamps. Plaintiff placed these items in a paper bag with his name on it. At Ms. Britton's

direction, Correctional Officer J. T. Smith placed the paper bag, along with other paper bags containing prisoners' property, into a large plastic trash bag. Officer Smith placed the trash bag in the luggage compartment of one of the buses.

22. On August 19, 1989 the bus carrying plaintiff arrived at the Lorton Maximum Security Facility. Ms. Britton came on board plaintiff's bus and gave two prisoners property she personally had carried for them. Plaintiff asked Ms. Britton to give him the property in the trash bag in the luggage compartment. She ignored plaintiff and walked away. Subsequently, plaintiff and D.C. prisoner James Neal asked Ms. Britton about their respective legal materials. She ignored them.

23. Plaintiff never received his property in the trash bag in the luggage compartment. Subsequently, plaintiff sued Ms. Britton in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia, No. SC 10003 90, seeking $72.50 in damages for her failure to return the property in the trash bag. Ms. Britton did not contest the claim. The District of Columbia paid the claim for her.

24. On August 19, 1989 Property Officer Cpl. R. Ward told plaintiff that his property from Washington State was not at the Lorton Maximum Security Facility. That day plaintiff called Ms. Britton's office. She declined to take the call. Plaintiff then wrote Ms. Britton requesting that his property be sent to him as soon as it was received by her. Plaintiff received no response to this letter.

25. Shortly thereafter, plaintiff noticed that other prisoners who had returned from Washington State had received their property. Plaintiff in late August 1989 wrote to the Director of the D.C. Department of Corrections, Walter Ridley, and

asked him to locate and deliver his property. Plaintiff received no response to this letter.

26. On September 7, 1989 plaintiff was transferred to the Federal Correctional Institution at Petersburg, Virginia. Before leaving, plaintiff saw prisoner John McNeill and others who had come from Washington State receive their property in Maximum Security R&D. At that time plaintiff and other prisoners bound for Petersburg spoke with Property Officer Cpl. R. Ward, who said none of them could take property to Petersburg because that was not their final destinations. Cpl. Ward said that if the prisoners wrote to him upon arriving at their final destinations their property immediately would be sent to them. Cpl. Ward also stated that if any prisoners did not want their property delivered to them, they had to sign a form authorizing release of the property to persons designated by them.

27. At no time did plaintiff sign a form authorizing release of his property to anyone besides himself.

28. Upon arriving at Petersburg, plaintiff learned from several other D.C. prisoners that Ms. Britton had been calling their parents or other relatives and telling them to come and pick up the prisoners' property or she was going to throw it away. Plaintiff immediately called his parents and told them that if they were called by Ms. Britton and asked to pick up plaintiff's property they were to refuse to do so. A few days later plaintiff again called his parents. His father told him that plaintiff's brother-in-law, Jesse Carter, had picked up plaintiff's property. Plaintiff became very upset upon hearing this, because he knew that once his property was outside the control of prison authorities he would have great difficulty getting permission to receive it. Plaintiff's mother became upset and hung up the phone.

29. Plaintiff called his brother-in-law, Jesse Carter, a D.C. government employee who does work at the Department of Corrections. Mr. Carter informed plaintiff that he had been called by Ms. Britton, that she had told him plaintiff was concerned about his legal materials and other property, that she was afraid that the property might get lost were she to send it from her office to the Lorton Property Officer for mailing to plaintiff, that she had asked Mr. Carter to pick up plaintiff's property and to keep it for plaintiff, and that Mr. Carter had picked up plaintiff's property at Ms. Britton's office. In fact, Ms. Britton had called Mr. Carter and asked him to pick up the property. He had done so and had taken the property to plaintiff's mother. Plaintiff asked Mr. Carter to take his property back to Ms. Britton so that it could be delivered to the Lorton Property Officer and mailed to plaintiff.

30. Plaintiff, still at Petersburg, told fellow D.C. prisoner Kenneth Ward what had happened to plaintiff's property. Mr. Ward became concerned about his own property, which included legal papers. Plaintiff and Mr. Ward spoke with a Bureau of Prisons official named Mr. Bender who advised them they could have their property sent to them upon arriving at their final destinations. Plaintiff and Mr. Ward then called Ms. Britton by telephone. To ensure Mr. Britton would accept the call, they arranged for Mr. Ward's friend in Seattle to call Ms. Britton without her knowing the call was a conference call with prisoners on the third line. Plaintiff and Mr. Ward told Ms. Britton that Mr. Bender had said they could have their property sent to them at their final destinations. Ms. Britton said Mr. Bender's information was incorrect and that she had no obligation to plaintiff and Mr. Ward regarding their property. Mr. Ward became frustrated trying to convince Ms. Britton he needed his legal materials. He called her a "dumb ass bitch" and she hung up the phone.

31. Thereafter, Mr. Carter went to see Ms. Britton and told her plaintiff wanted her to take the property back and deliver it to the Lorton Property Officer for mailing to plaintiff. Ms. Britton refused to do so. She said she did not see why plaintiff was making such a big fuss about his property because as far as she was concerned plaintiff should be happy she did not throw it in the trash. She told Mr. Carter federal prisons would not accept shipments of D.C. prisoner property.

32. Plaintiff requested that attorney Robert Hauhart seek return of plaintiff's property. By letter dated September 28, 1989 to Assistant Corporation Counsel Paul Quander, Mr. Hauhart requested that plaintiff's property, and that of D.C. prisoner Kenneth Ward, be returned to them. In part, the letter stated:

> It is my understanding from letters and conversations with my clients, and conversations and correspondence with Jay Alexander, Esq., . . . that Ms. Britton has declined to provide Mr. Ward and Mr. Crawford, and others in similar circumstances, with their legal materials, and has refused to forward their personal property.

33. On October 10, 1989 Mr. Hauhart wrote a letter to Arthur Graves, Associate Director of the Department of Corrections. Following the suggestion of Mr. Reeder, a member of Mr. Graves's staff, Mr. Hauhart enclosed a copy of his September 28 letter to Mr. Quander and said:

> Mr. Reeder stated that to the best of his knowledge residents returning from Washington State would have their property forwarded by the Department to their final BOP destination. This is the goal I seek on behalf of Mr. Crawford and Mr. Ward, as my letter to Mr. Quander makes clear. I assume this constitutes a reversal of the

> policies being pursued by Ms. Britton which were the source of my complaint. Please advise me at your convenience if Mr. Reeder is correct so I may advise my clients of the policy the Department [in]tends to follow.

34. On December 20, 1989 Mr. Hauhart again wrote Mr. Quander, who by then was Acting Deputy Director of the D.C. Department of Corrections. The letter was written on behalf of plaintiff, Kenneth Ward, and two other D.C. prisoners, James Neal and Edward Ashford, all four of whom were plaintiffs in the Alton Best litigation. The letter stated that the four prisoners still had not received their property. It said plaintiff's property had been "released without permission to Jesse Carter (brother-in-law), 4241 58th Ave, Apt. 9, Bladensburg, Md. 20710, (301) 277-0675." The letter requested Mr. Quander to "direct appropriate staff to arrange for locating and properly forwarding" plaintiff's property.

35. On January 9, 1990, Mr. Quander wrote in reply to Mr. Hauhart's December 20 letter. Mr. Quander stated:

> As pointed out in the attached letter dated December 22, 1989 from Mr. P.S. Wise, Administrator, Correctional Programs Branch, Bureau of Prisons, clear guidance regarding the processing of property of DOC inmates who are transferred to federal custody is provided.
>
> We are therefore moving with deliberate speed to dispatch inmates property, including the four (4) individuals cited in your correspondence, in compliance with mentioned direction given by the Bureau of Prisons.

The attached December 22 letter from Mr. Wise stated:

> As has been our past practice, inmates transferring from DCDOC to BOP custody are permitted only a small

amount of personal property which should be limited to personal care items and legal documents. This practice has been necessary based upon significant differences between DCDOC and BOP property policies and differences among individual BOP facilities. In special cases, we ask that DCDOC contact individual facility Inmate Systems staff for permission prior to mailing any inmate personal property to a BOP facility.

36. Neither Ms. Britton, nor any other District of Columbia official, contacted Mr. Carter or any member of plaintiff's family to retrieve plaintiff's property and to forward it to plaintiff by mail from the Department of Corrections.

37. Given the time that had elapsed, plaintiff believed Ms. Britton and the Department of Corrections would not timely act to retrieve his property and deliver it to him through prison channels. Consequently, he asked his mother to mail his property to him. She did so, at plaintiff's expense. Because the property was mailed outside prison channels, federal BOP officials at FCI Marianna, Florida, where plaintiff was housed, initially refused to allow plaintiff to receive his property. Plaintiff submitted an administrative complaint through FCI channels demanding that he be allowed to receive his property. The complaint caused several FCI Marianna officers and officials to become annoyed with and hostile to plaintiff. Plaintiff's administrative complaint ultimately succeeded. He was allowed to receive his property in February 1990.

38. In early February 1990 Mr. Quander wrote Mr. Hauhart a letter stating plaintiff's property had been released to Mr. Carter "after Mr. Crawford failed to indicate disposition of his property." Plaintiff, however, had not "failed to indicate disposition of his property." As noted above, plaintiff repeatedly had informed Ms. Britton, and had written

Mr. Ridley stating, that he wanted his property delivered to him.

39. Ms. Britton intentionally diverted plaintiff's property outside D.C. government control. She diverted plaintiff's property to Mr. Carter in the latter's capacity as plaintiff's brother-in-law, not in his capacity as a D.C. government employee. Ms. Britton knew she had no supervisory authority over Mr. Carter and that Mr. Carter's employment duties did not include handling prisoner property.

40. Ms. Britton received no information indicating plaintiff had authorized delivery of his property to any person other than himself. Ms. Britton diverted plaintiff's property to Mr. Carter either knowing the latter was not authorized by plaintiff to receive it, or with reckless disregard for and deliberate indifference to whether Mr. Carter was so authorized.

41. Ms. Britton withheld and diverted plaintiff's property

(a) out of hostility toward plaintiff stemming from his authorized communication with newspaper reporters, informal requests for redress of grievances, assistance to and authorized association with other prisoners seeking redress, persistent requests for return of his property, or past, pending, or contemplated litigation against her, other Department of Corrections employees, or the District of Columbia; and

(b) knowing, or with reckless disregard for and deliberate indifference to whether, plaintiff's property included materials he needed to pursue legal matters.

42. Ms. Britton had been delegated authority to establish District of Columbia policy on handling prisoner property in the program of interstate transfers for which she had

administrative responsibility. Her actions as to plaintiff's property were in exercise of that delegated authority.

43. In the alternative, Ms. Britton's actions as to plaintiff's property were proximately caused by the District of Columbia custom, policy, or practice of inadequately investigating, and not disciplining Department of Corrections employees for, wrongful deprivation of prisoner property.

44. In the alternative, Ms. Britton's withholding and diversion of plaintiff's only copy of (a) papers filed in federal court civil actions brought *pro se* and *in forma pauperis*, (b) papers recording facts relevant to contemplated damage claims within federal court jurisdiction, and (c) a photograph believed necessary for a postconviction motion in plaintiff's criminal case was proximately caused by the District of Columbia's custom, policy, or practice of separating prisoners from their property for indefinite periods (i) without regard to whether the property includes materials needed to pursue judicial redress, (ii) without either establishing written Department of Corrections policies recognizing and protecting prisoners' constitutional rights not to be unreasonably deprived of these materials, or training persons in positions such as Ms. Britton's to respect these rights, and (iii) without affording prompt informal hearings at which prisoners may inform a responsible official of her or his need to retain, or seasonably obtain, possession of particular legal materials in order to meet deadlines in, or otherwise properly to pursue, ongoing or contemplated legal proceedings, and through which prisoners upon adequate representation of their need may be allowed to retain designated materials, or be assured that particular materials will be returned within a period not prejudicial to their pursuit of redress.

45. As a result of Ms. Britton's withholding and diversion of his property plaintiff (a) incurred the expense of first class

mail delivery of his three heavy boxes from the District of Columbia to FCI Marianna, Florida; (b) incurred the expense of purchasing underwear, tennis shoes, soft shoes, and other items which he would not have needed to buy had his property been timely delivered; (c) suffered mental distress from the stressful communications with officials and family members, the deprivation of pictures of loved ones, worry that his property might permanently or indefinitly be withheld from him, worry that his pending legal proceedings would be prejudiced, and worry that his pursuit of the administrative complaint in FCI Marianna would adversely affect his relationships with FCI Marianna staff.

Claims

46. Ms. Britton's diversion of plaintiff's property outside government control to an unauthorized person constituted the common law tort of conversion, for which she is liable to plaintiff for nominal or compensatory as well as punitive damages.

47. Under the doctrine of *respondeat superior* the District of Columbia is jointly and severally liable with Ms. Britton for nominal or compensatory damages stemming from her conversion of plaintiff's property.

48. Ms. Britton's unconstitutionally-motivated withholding and diversion of plaintiff's property, as stated in paragraph 41(a), violated plaintiff's First Amendment rights to freedom of speech and to petition for redress of grievances. For this violation she is liable to plaintiff under 42 U.S.C. §1983 for nominal or compensatory as well as punitive damages.

49. Ms. Britton's withholding and diversion of plaintiff's property knowing, or with reckless disregard for and deliberate indifference to whether, it included materials he

needed to pursue legal matters, as stated in paragraph 41(b), violated plaintiff's First Amendment right to petition for redress of grievances, his constitutional right of court access, and his Fifth Amendment right to substantive due process, because the withholding and diversion unreasonably deprived plaintiff of his only copy of (a) papers filed in pending federal court civil actions he had brought *pro se* and *in forma pauperis*, (b) papers recording facts needed for contemplated damage claims within federal court jurisdiction, and (c) a photograph reasonably believed necessary for a postconviction motion in plaintiff's criminal case. For these violations Ms. Britton is liable to plaintiff under 42 U.S.C. §1983 for nominal or compensatory as well as punitive damages.

50. The District of Columbia is jointly and severally liable with Ms. Britton under 42 U.S.C. §1983 for nominal or compensatory damages for her constitutional violations because, as stated in paragraph 42, these violations were committed in exercise of policymaking authority delegated to her by the District.

51. In the alternative, the District of Columbia is jointly and severally liable with Ms. Britton under 42 U.S.C. §1983 for nominal or compensatory damages for her First Amendment violation stated in paragraph 48, because, as stated in paragraph 43, her violation was proximately caused by District custom, policy, or practice manifesting deliberate indifference to correctional officials' wrongful deprivations of prisoner property.

52. In the alternative, the District of Columbia is jointly and severally liable with Ms. Britton under 42 U.S.C. §1983 for nominal or compensatory damages for her constitutional violations stated in paragraph 49 because, as stated in paragraph 44, these violations were proximately caused by

District custom, policy, or practice violating plaintiff's Fifth Amendment right to procedural due process, and manifesting deliberate indifference to prisoners' constitutional rights not to be unreasonably deprived of materials needed by them to pursue judicial redress.

Relief Requested

53. Plaintiff asks the Court

a. to assert jurisdiction over plaintiff's claims;

b. to declare that the District of Columbia customs, policies, or practices stated in paragraph 44 violate the First and Fifth Amendments and the constitutional right of court access;

c. to enjoin the District of Columbia--and each of its officers, agents, and employees having contact with or control or authority over plaintiff's property--from (i) depriving plaintiff of his legal materials without affording a prompt informal hearing as stated in paragraph 44(iii), and (ii) separating plaintiff from materials he reasonably deems necessary to pursue legal redress, for periods he reasonably deems likely to be prejudicial to that pursuit;

d. to award plaintiff compensatory damages for the injuries stated in paragraph 45, or at least nominal damages, and to hold Ms. Britton and the District of Columbia jointly and severally liable therefor;

e. to award plaintiff punitive damages against Ms. Britton;

f. to award plaintiff his costs and reasonable attorneys' fees under 42 U.S.C. §1988, and to hold Ms. Britton and the District of Columbia jointly and severally liable therefor;

g. to afford plaintiff such additional or alternative relief as the Court deems just.

Jury Demand

54. Plaintiff demands trial by jury of his damage claims.

Verification

I declare under penalty of perjury that the statements in paragraphs 1-38 and 45 above are true and correct and that the statements in paragraphs 39-44 above are believed true to the best of my knowledge.

Executed this _____ day of March, 1992.

_____
Leonard R. Crawford-El

Respectfully submitted,

_____
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